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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Petitioner,*

v.

BANGOR & AROOSTOOK RAILROAD COMPANY, et al., THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

JOSEPH L. RAUH, JR.
JOHN SILARD
HARRIETT R. TAYLOR
Rauh and Silard
1001 Connecticut Ave., N.W.
Washington, D.C. 20036

ISAAC N. GRONER
STEPHEN E. MOSS
Cole and Groner
1730 K Street, N.W.
Washington, D.C. 20006

HAROLD C. HEISS
DONALD W. BENNETT
Heiss, Day and Bennett
Keith Building
Cleveland, Ohio 44115
Attorneys for Petitioner.

Of Counsel:

ALEX ELSON
WILLARD J. LASSERS
AARON S. WOLFF
Elson, Lassers and Wolff
11 South LaSalle Street
Chicago, Illinois 60603

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Statute Involved	2
Question Presented	2
Statement of Facts	2
1. The National Diesel Agreement of 1950	3
2. Genesis of Public Law 88-108	4
3. The Presidential Message	5
4. The Congressional History	6
5. The Public Law	10
6. The Award of Arbitration Board 282	10
7. The Railroads' Unlawful Refusal to Bargain	13
8. Issues Resolved by the District Court	15
9. The Ruling Below	17
Reasons for Granting the Writ	21
1. Rejection of the Public Law's Manifest Intent	22
2. Conflict with this Court's *Rock Island* Decision	24
3. Conflict with a Basic Congressional Tenet	25
4. Impugning of the Statute by Judicial Legislation	27
5. Comity Considerations Call for High Court Review	29
Conclusion	32
Appendix A: Opinions and Judgment Below	1a
Appendix B: Public Law 88-108	55a

Table of Cases

Automobile Workers v. *O'Brien*, 339 U.S. 454	28
Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398	31
Brotherhood of Locomotive Firemen and Enginemen v. *Bangor and Aroostook Railroad Company, et al., The Atchison, Topeka and Santa Fe Railway Company, et al.*, D.C. Cir. Nos. 20,472, 20,473, 20,909, 20,910	16, 22
BLF&E v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11, affirmed 331 F. 2d 1020, cert. denied 377 U.S. 918	10

Page

Brotherhood of Locomotive Firemen and Enginemen v. *United States ex rel Central of Georgia Railway Company, et al.*, 5th Cir., Nos. 23,622 and 23,815 . . 22
Brotherhood of Locomotive Firemen and Enginemen v. *Louisville & Nashville Railway Co.*, 6th Cir., No. 17,588 22
Brotherhood of Locomotive Firemen and Enginemen v. *New York Central Railroad Co.*, D.C. Cir., No. 20,647 . . . . . 16, 22
Carpenters' Union v. *Labor Board*, 357 U.S. 93,100 . . 23
Coleman v. *Miller*, 307 U.S. 433 30
Commissioner v. *Brown*, 380 U.S. 563, 571 24
Commissioner v. *Gillette Motor Co.*, 364 U.S. 130, 134 24
Commissioner v. *P. G. Lake, Inc.*, 356 U.S. 260, 265 . . 24
Engineers v. *Chicago, R.I. & P.R. Co.*, 382 U.S. 423, 432-433 . . . . . 6, 24, 25
Ex Parte Peru, 318 U.S. 578, 601 30
Graves v. *New York*, 306 U.S. 466 31
Helvering v. *Hammel*, 311 U.S. 504, 510, 511 24
In re Neagle, 135 U.S. 1 31
Labor Board v. *American Ins. Co.*, 343 U.S. 395 28
Locomotive Engineers v. *B. & O. R. Co.*, 372 U.S. 284 5, 27
McCulloch v. *Sociedad Nacional*, 372 U.S. 10 31
Missouri v. *Holland*, 252 U.S. 416 31
Sinclair Refining Co. v. *Atkinson*, 370 U.S. 195 24
U.S. v. *Great Northern R. Co.*, 343 U.S. 562, 575 24
U.S. v. *Public Utilities Comm'n*, 345 U.S. 295, 311 . . . 24
United States v. *Mine Workers*, 330 U.S. 258 30
United States v. *Morgan*, 307 U.S. 183 30-31
Watkins v. *Conway*, 385 U.S. 188 31
Wilson v. *New*, 243 U.S. 332 2
Wolff Co. v. *Industrial Court*, 262 U.S. 522 2
Woodwork Manufacturers v. *N.L.R.B.*, 386 U.S. 612, 640 . . . . . 22, 24

OTHERS

109 Cong. Rec. 15976 . . . . . 7, 13
109 Cong. Rec. 16128, 16130 7

	Page
109 Cong. Rec. 13004, H.Doc. No. 142, 88th Cong. 1st Sess.	5, 6
Hearings on the Administration of Public Law 88-108 Before the Senate Committee on Interstate Commerce, 89th Cong., 1st Sess. 359 (1965)	12, 14
Hearings on H.J.Res. 565 Before the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess. 559 (1963)	8, 14
Hearings on S.J. Res. 102 Before the Senate Committee on Interstate Commerce, 88th Cong., 1st Sess. 49-50	8
H.R. Rep. No. 713, 88th Cong., 1st Sess. 14 (1963)	7
Opinion of Neutral Members, 41 LA 680, 681 (1963)	12
Railway Labor Act, ch. 347, 44 Stat. 577 (1926)	26
Railway Labor Act, ch. 691, 48 Stat. 1185 (1934)	26
Robertson & Kirkham, *Jurisdiction of the Supreme Court* 210 (1951 ed.)	30
S. Rep. No. 459, 88th Cong., 1st Sess. 10 (1963)	6
28 U.S.C. § 1252	30
29 U.S.C. §§ 101-115 (ch. 90, 47 Stat. 70)	27
45 U.S.C. §§ 153, 157	26

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered herein on July 31, 1967.

Opinions Below

The opinion and supplemental opinion of the Court of Appeals for the District of Columbia Circuit, dated May 12, 1967 and July 31, 1967 respectively, are not yet reported and are set forth in Appendix A at p. 1a and p. 36a. The judgment entered July 31, 1967 is set forth at p. 50a. An opinion and order denying respondents' petition for re-

hearing, issued on September 21, 1967, is set forth at p. 51a.

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on July 31, 1967. A timely petition for rehearing filed by respondents herein was denied on September 21, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statute Involved

Public Law 88-108 (77 Stat. 132, 45 U.S.C. following § 157) is set forth in Appendix B, pp. 55a to 58a, *infra*.

Question Presented

Public Law 88-108, an unprecedented 1963 emergency statute, subjected the fireman manning dispute between petitioner BLF&E and the nation's railroads to compulsory arbitration for a period "not to exceed two years." Reductions were effected under the Award during its two-year life in firemen jobs secured by existing collective bargaining contracts. Do such reductions continue in effect after the Award's expiration on March 31, 1966 and, further, may the railroads make additional reductions thereafter pursuant to the expired Award?

Statement of Facts

This case arises from the first Congressional experiment with the substitution of compulsory arbitration for collective bargaining.[1] Universal hostility of both employers and unions has been reflected in the scrupulous avoidance of compulsory labor arbitration in federal labor laws from

[1] The suggestion by the court below that the 1916 eight-hour day law upheld in *Wilson* v. *New*, 243 U.S. 332, constituted an earlier compulsory arbitration measure is strained. Congress, not an arbitration board, set the working standards in that instance. Cf. *Wolff Co.* v. *Industrial Court*, 262 U.S. 522.

their inception. But in 1963, under a threat by the nation's railroads to discharge their long-time firemen employees and the union's counter-threat of a nationwide strike, Congress enacted an emergency measure constituting a first and limited experiment with compulsory labor arbitration. Public Law 88–108 (pp. 55a to 58a, *infra*) authorized a two-year arbitration of the fireman manning dispute by a special arbitration board. That interim approach reflected a repeatedly-expressed Congressional hope and expectation that during the limited arbitration period, and faced with its forthcoming expiration, the parties would settle their differences through collective bargaining and arrive at a final resolution of the fireman manning issue.

However, at the expiration of the two-year Award on March 31, 1966, no agreement had been achieved between the parties (the railroads having refused to bargain with the BLF&E), and the employment rights of the firemen following the Award's expiration thereupon became the subject of this federal litigation. In its original and supplemental opinions rendered in this case in May, July and September of 1967, the court below has resolved against petitioner the basic issue of the continuation of the Award after its termination date. The court below finds that Award-approved reductions in contractually-required firemen jobs survive the Award's expiration and the court further rules that the Award authorizes additional firemen reductions even after its termination. We set forth below the salient legislative and judicial history upon the issue of post-Award fireman manning requirements, whose adverse resolution we ask this Court to review.

1. *The National Diesel Agreement of 1950*

This case involves the effect of special compulsory-arbitration legislation upon collective bargaining agreements; accordingly, the appropriate point of departure is

the last agreement between the parties. This was the National Diesel Agreement, signed in May of 1950 after the parties had followed the procedures of the Railway Labor Act and had successfully engaged in collective bargaining on fireman manning requirements. The 1950 Agreement was only the most recent in a series of such agreements dating back to the fireman manning clauses adopted in 1933 and 1937.

The 1950 Diesel Agreement provides that a fireman (taken from the seniority ranks of firemen) must be employed on every locomotive (J.A. 4, 129). This comprehensive requirement governed the employment of firemen upon the nation's railroads at all times until the two-year period of the special arbitration award promulgated under the 1963 Public Law. No successor collective bargaining agreement governing fireman manning requirements has been reached by the parties. Accordingly, the requirements of the 1950 National Diesel Agreement are now again in full effect unless modifications thereof by the statutory Award survived its expiration. Upon that central issue the history and text of the Public Law itself are illuminating and decisive.

2. *Genesis of Public Law 88-108*

In November, 1959, pursuant to Section 6 of the Railway Labor Act the railroads served a Notice upon the BLF&E which proposed to eliminate the requirement that firemen be employed on freight and yard engines; instead, the railroads proposed to leave the employment of firemen completely to managerial discretion (JA 5, 11, 60, 70-72, 76-77). In September, 1960, various unions including the BLF&E served counter-notices under Section 6 which dealt with the composition of train and yard crews in all classes of engine service (JA 5-6, 17, 60-61, 73, 77). After a succession of bargaining steps, including a special Presidential

Study Commission and intervention by the National Mediation Board, the dispute remained unresolved. On March 4, 1963 this Court (*Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284) ruled that all voluntary bargaining procedures having been exhausted the parties were free to resort to self-help. Efforts by an Emergency Board and the Secretary of Labor were unsuccessful. The railroads then announced that in July of 1963 they would change the rules unilaterally, causing the unions to respond that the result of such action would be a nationwide strike. On July 22, 1963, President Kennedy sent a Special Message to Congress proposing legislation to deal with the dispute on a temporary two-year basis (109 Cong. Rec. 13004, H. Doc. No. 142, 88th Cong., 1st Sess.).

3. *The Presidential Message*

In his Special Message to Congress proposing enactment of an emergency measure, President Kennedy expressly declared (109 Cong. Rec. at 13006) that among his objectives was to find a solution which:

> "(2) encourages the parties to achieve their own solutions through collective bargaining . . ." and
>
> "(5) provides for an *interim remedy* while awaiting the results of further bargaining by the parties" (Emphasis added throughout).

He recommended (*ibid.*) that "for a 2-year period during which both the parties and the public can better inform themselves on this problem . . . *interim work rules changes* proposed by either party to which both parties cannot agree should be submitted for approval, disapproval or modification to the Interstate Commerce Commission . . ."

President Kennedy's message repeatedly underlined that he was recommending "only interim changes", "interim rules" and "temporary procedures". He emphasized that he was not recommending "a general and permanent com-

pulsory arbitration law" but only a provisional remedy, which would be limited in time and effectiveness so as to accord preference always to collective bargaining: "The measure I am recommending today, in contrast with compulsory arbitration, gives encouragement and preference to solutions reached by collective bargaining, and provides only for interim decisions" (*id.* at 13007).

4. *The Congressional History*

President Kennedy recommended that during the proposed two-year period the "interim work rules changes" be controlled by decisions of the Interstate Commerce Commission. Opposition to use of the ICC developed in the course of the Congressional deliberations and Public Law 88-108 as ultimately enacted substituted a special arbitration board in place of the Commission. Otherwise Congress followed the Presidential recommendations. *Engineers* v. *Chicago, R.I. & P. R. Co.*, 382 U.S. 423, 432-433. Indeed, the entire Congressional history echoes the limited-life emphasis of the President's proposal. Thus the favorable Report of the Senate Committee on Interstate Commerce (S. Rep. No. 459, 88th Cong., 1st Sess. 10 (1963)) declared that:

> "Under the terms of the resolution, the arbitration award would be binding for no more than 2 years, unless the parties mutually agree to a different period. The committee has imposed this limitation in harmony with the President's recommendation, in order to closely limit the scope and impact of the resolution."

Again, in discussing Section 4 (the duration clause), the Senate Report pointed out that it would "provide that the Board would determine the period for which its award would remain in force, but would be no longer than 2 years unless the parties agreed otherwise" (*id.* at 11). The House Committee on Interstate and Foreign Com-

merce similarly underscored the limited duration of the arbitral award (H.R. Rep. No. 713, 88th Cong., 1st Sess. 14 (1963)):

> "The arbitration award is to be in effect for the period determined by the arbitration board but that period cannot exceed 2 years from the date the award takes effect; however, the award can be in effect for a different period if the parties agree thereto."

In the floor debates, as in the Committee reports, the delimited duration of the Award was repeatedly noted. Thus Senator Morse stated (109 Cong. Rec. 15976) that:

> "It appears to be the intention in this section, read in the light of the scheme of the resolution and of the legislative background, that these rules will provide a basis for the manning of the trains for the interim period only.
>
> "Stated conversely, the resolution does not authorize the Commission to approve rules which are dispositive of the entire manning issue for the indefinite future. The emphasis is on interim work rule procedures to be effective only until such time as the parties reach agreement regarding the entire matter or 2 years following the date the interim rule goes into effect, whichever occurs sooner."

Congressman Oren Harris, Chairman of the House Interstate and Foreign Commerce Committee which reported favorably on the measure, specifically advised the House that the pre-Award situation would be fully restored at the expiration of the Award *as though the legislation had never been passed.* He said (109 Cong. Rec. 16128, 16130):

> "So we have been trying to take a course that would bring these issues to final resolution where they could be settled. The resolution provides that on the

two major issues, order of the arbitration board would be in force for a period of 2 years. Then the issues go back under the regular established procedure of collective bargaining . . .

"Mr. Fulton of Pennsylvania. And at the end of a 2-year period that these arbitration rulings have been in effect, what would happen then?

"Mr. Harris. As I explained a moment ago, it goes back to the usual collective bargaining processes.

"Mr. Fulton of Pennsylvania. So then it is as if this resolution had never been passed at that time?

"Mr. Harris. That is true."

Speaking for the Administration before the Senate Committee on Commerce, Secretary of Labor Wirtz stated that the effectiveness of the arbitrated interim work rules "would terminate at the end of the 2-year period" (Hearings on S.J. Res. 102 Before the Senate Committee on Interstate Commerce, 88th Cong., 1st Sess. 49-50):

"Senator Pastore . . . The determination will last only for a period of two years. It is a temporary resolution; is that correct?

"Secretary Wirtz. I would assume, Mr. Chairman, in complete good faith within that 2-year period the parties would have worked out the resolution of this matter. If they would not, the effectiveness of that rule would terminate at the end of the 2-year period unless other action were taken."

Secretary Wirtz likewise emphasized the two-year limitation in his testimony before the House Committee (Hearings on H.J. Res. 565 Before the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess. 55-56):

"Mr. Springer. At the end of the 2-year period

for which the order is entered where are you then on the same rule?

"Secretary Wirtz. The interim rule would at that point no longer be effective.

"Mr. Springer. You would be back exactly where you are this morning?

"Secretary Wirtz. I don't know what you mean by where we are this morning. If the parties had not accomplished anything at all in the 4-year period to which you refer, which is contrary to every reasonable expectation in this case, if they had accomplished nothing, then we would be, and none of them had accomplished anything, then we would face the same situation we do now."

Chairman Wolfe of the National Railway Labor Conference, the railroads' spokesman on the bill, also reiterated the temporary character of the legislation to the House Committee. When Congressman Moss noted that the railroads "are not seeking here, nor does the resolution, any elements of compulsion other than purely interim compulsion . . .", Mr. Wolfe replied, "I so understand the resolution" (*id.* at 570). When questioned by Congressman Dingell as to whether two years would be a sufficient time, Mr. Wolfe replied, "I believe that we consider that interim proposition is such as this, that 2 years is about as far as we should go" (*id.* at 555).[2]

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[2] In the courts below respondents made no answer to this massive legislative emphasis upon the limited two-year effect of the arbitral Award, except to claim that much of the legislative history set forth above concerned the Presidential proposal for arbitration by the ICC rather than a special board. But, as the court below emphasizes (*infra*, at p. 17a, n. 23 and p. 30a), quoting this Court's *Rock Island* decision, Congress enacted President Kennedy's proposal "with but 'one significant change' not relevant here"—the substitution of a special arbitration board for the ICC. Concerning the interim nature of the arbitral intrusion, the legislative intent throughout remained consistent with the President's emphasis.

5. *The Public Law*

Public Law 88-108 (Section 2) established an arbitration board of seven members, two each representing the carriers and the unions and three neutral members who were appointed by the President. The arbitration board was to "make a decision . . . as to what disposition shall be made" of the carriers' bargaining notices of November 2, 1959 concerning the use of firemen and other matters. The award of the board was to be "binding on both the carrier and organization parties to the dispute" (Section 3).

The effective life of the arbitral award was controlled by Sections 4 and 8 of the Public Law. Section 8 of the Public Law provided that "This joint resolution shall expire one hundred and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence." The last sentence of Section 4 provided that "The award shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise."

6. *The Award of Arbitration Board 282*

Arbitration Board 282 issued its Award on November 25, 1963 (J.A. 121).[3] With respect to the firemen the

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[3] A number of the Brotherhoods, including petitioner, promptly brought suit to challenge the validity of the statute and the Award, but both were sustained by the lower federal courts. *BLF&E* v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11, affirmed 331 F. 2d 1020. The Brotherhoods petitioned for a writ of certiorari (*BLF&E* v. *Certain Carriers*, No. 935, October Term, 1963), but this Court denied review (377 U.S. 918) after the Government filed an Opposition urging that the case lacked importance because the Award would expire after two years:

> "The statute itself has already expired, except for the Award, which has a two-year life. . . . The narrow scope of this legislation—providing for binding arbitration of two issues in a particular dispute for a limited period—indicates that the case is not of sufficient general

Award provided in effect that in freight and yard service the railroads could designate positions (up to a ceiling of 90 per cent) from which firemen could be severed (see *infra*, p. 38a). Firemen who had less than two years of seniority could be severed upon payment of specified severance pay; those with more than two years but less than ten could be offered the option of comparable jobs with a minimum five-year guaranty of employment; firemen with more than ten years of seniority could not be severed (J.A. 108-114). The Award stipulated that "all agreements, rules, regulations, interpretations, and practices, however established, with respect to the employment of firemen" continue undisturbed "except as modified by the terms of this Award" (J.A. 108).

Part IV of the Award, in faithful adherence to the Congressional requirement, provided that "This Award shall continue in force for two years from the date it takes effect, unless the parties agree otherwise" (J.A. 121).[4] Moreover, the opinion of the Board's neutral members underscores that they did not purport to promulgate rules which would continue after the two-year Award period: "The Board's award will remain in force only two years. Within that time the effect of attrition may be such that the number of firemen . . . actually eliminated may be comparatively small. Problems that are as deeply rooted and that have been as long in development as those here involved, however, cannot be solved overnight. . . . If, through this award, principles are established and procedures set

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importance to warrant review by this Court" (Brief in Opposition, pp. 24-25).

This representation has now been impugned by the ruling below giving continuing effect to the Award.

[4] Pursuant to an agreement between the parties the Award's duration was extended for a short period and expiration was fixed at 12:01 A.M., March 31, 1966 (J.A. 9-10, 20-21, 67, 81).

in motion which contribute to a final solution, our hopes as neutral members of this Board will have been fulfilled." *Opinion of Neutral Members,* 41 LA 680, 681 (1963).[5]

In like fashion, after promulgation of the Award the Chairman of the Arbitration Board, Mr. Ralph Seward, made clear the limited duration of the Award in testimony before the Senate Commerce Committee (Hearings on the Administration of Public Law 88-108 Before the Senate Committee on Interstate Commerce, 89th Cong., 1st Sess. 359 (1965)):

> "Senator Pastore: But the fact of the matter is, that there would be an elimination, as a practical and realistic conclusion, 90 percent of the slots?
>
> "Mr. Seward: If there were time enough, that would result, yes . . .
>
> "Senator Pastore: What do you mean by, 'If there were time enough'?
>
> "Mr. Seward: Just that in 2 years, which our award only runs for 2 years, this procedure, the processes of attrition, could not operate enough to take—to allow the elimination of that number of jobs."

During the two-year life of the Award, and pursuant to its provisions, the railroads effected the severance from employment of some 18,000 men—approximately half of the 36,500 firemen working just prior to the Award (Hearings on H.J. Res. 565 Before the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess., 1963). This was three times as great a reduction as the

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[5] On the basic dispute over fireman manning the neutral members of Arbitration Board 282 examined the opposing contentions and concluded that "The record contains no evidence to support the charge, frequently and irresponsibly made, that firemen presently employed in road freight and yard service throughout the country are being paid to do nothing and actually perform no useful work." 41 LA at 687. They made a finding to the contrary: "We think it clear", said the opinion, "that firemen are presently performing useful services." 41 LA at 688.

Arbitration Board itself had expected (see *infra*, p. 41a, n. 1). The net payroll gain to the railroads during the life of the Award, after deduction of severance allowances paid by them, was in excess of one hundred forty-three million dollars (J.A. 132).

7. *The Railroads' Unlawful Refusal to Bargain*

In enacting the Public Law, Congress pinned its hopes for ultimate resolution of the manning dispute not upon a final arbitral Award but upon interim arbitral intervention to be supplanted by collective bargaining resolution of the fundamental issue. That emphasis is found in the preamble recitation that it is desirable to achieve the stated objectives of the Public Law *"in a manner which preserves and prefers solutions reached through collective bargaining"* (p. 55a, *infra*), and is repeated throughout the legislative history. President Kennedy urged a Congressional enactment which would encourage "the parties to achieve their own solutions through collective bargaining" by "an interim remedy while awaiting the results of further bargaining by the parties" (see p. 5, *supra*). Senator Morse underlined that the two-year arbitration proposal "would encourage and stimulate the parties to continue to bargain in order to develop final solutions . . ." (109 Cong. Rec. 15976). Secretary Wirtz made the same point in his Senate testimony in response to a question about the temporary nature of the arbitration: "I would assume, Mr. Chairman, in complete good faith within that 2-year period the parties would have worked out the resolution of this matter" (see p. 8, *supra*). To the same effect was testimony by Chairman Wolfe of the National Railway Labor Conference, who told the House Committee of his "hope" that during the two-year period "the parties will themselves have disposed of these issues in conference within the procedures of the Railway Labor

Act." Indeed, Mr. Wolfe *promised* that Committee "We will be willing to bargain under any circumstances". (Hearings on H.J. Res. 565 Before the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess. 559 (1963)).[6]

Congress thus expected that during the period of the Award the parties would come to a voluntary agreement concerning the manning requirements to apply upon its expiration. Undoubtedly, Congress believed that the parties' experience under a temporary Award requiring both sides to recede from their ultimate positions would facilitate collective bargaining of a permanent solution. This Congressional anticipation was honored by the BLF&E but frustrated by the railroads. On November 15, 1965, many months before expiration of the Award, the BLF&E in its Notice No. 1 (J.A. 144-147) requested the railroads to bargain a modified manning provision which *"would have pegged employment at a level of 6000 jobs below the terms of the National Diesel Agreement."*[7] If the railroads had met and negotiated in good faith about post-Award manning requirements—as Congress expected—there would likely have been achieved for the first time a negotiated reduction in fireman manning requirements.

However, the railroads adamantly—and unlawfully, as the court below finds (p. 21a, *infra*)—refused to bargain about manning requirements applicable upon expiration of the Award (J.A. 164-166). For this frustration of the Con-

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[6] It is worthy of note also that in October of 1965, after seventeen days of hearings concerning the administration of the 1963 Award, the Senate Commerce Committee passed a Resolution calling upon the parties to engage in further collective bargaining (J.A. 142).

[7] See opinion below, p. 25a, *infra*. It is notable that the 6,000-man reduction offered by the BLF&E as its *initial* bargaining position was actually more than the 5,500 reductions which the Chairman of the Arbitration Board testified the Board had anticipated under its Award. Hearings on the Administration of Public Law 88-108 Before the Senate Committee on Interstate Commerce, 89th Cong., 1st Sess. 364 (1965). See p. 41a, n. 1, *infra*.

gressional intention—accomplished in the face of the railroads' own *promise* of bargaining made to Congress by their witness—the railroads have never given an explanation. But their refusal to bargain is adequately explained by their subsequent conduct. Instead of negotiating for a solution, they staked their post-Award hopes upon a judicial fiat continuing the job reductions effected under the temporary Award and authorizing even further fireman attrition.

8. *Issues Resolved By the District Court*

Prior to the expiration of the Award the railroads filed suits in the United States District Court for the District of Columbia for declaratory judgments governing the rights of the parties after expiration of the Award. Their actions were filed on January 19, 1966 against the Brotherhood of Railroad Trainmen and on March 24, 1966 against the BLF&E (J.A. 43; No. 20,192 in the court below). The suit against the firemen and an earlier test suit by the BLF&E (J.A. 2; No. 20,193 in the court below) were tried upon stipulation of the facts. The opinion of District Judge Holtzoff, filed May 9, 1966 (J.A. 219), ruled against the BLF&E on its basic contention, as it did on nearly every issue.[8]

The District Court expressly rejected (J.A. 223) the position of the BLF&E that the pre-Award fireman manning requirements of the National Diesel Agreement were restored to effect when the Award expired. According to the District Court "the Award and the operations under it created a new status in regard to rules and working conditions"— a "new plateau" which survives the expiration

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[8] The BLF&E's 1965 bargaining notices were held premature and non-bargainable (J.A. 226-228). The railroads were therefore exonerated from any unlawful refusal to bargain before the expiration of the Award and a BLF&E strike was ruled a violation of the Railway Labor Act duty to exhaust bargaining steps before invoking self-help (J.A. 223, 228).

of the Award until and unless changed by agreement of the parties. In the District Court's view, fireman positions vacated during the interim Award were "*permanently abolished*" (J.A. 224).

But Judge Holtzoff went even further and authorized *continuing* reductions after the expiration of the Award. Although asserting that "neither side may take any further affirmative steps under the Award after its termination date" (J.A. 224), he approved additional reductions in the ranks of firemen by "attrition" resulting from the non-filling of new vacancies occurring after Award expiration.[9] Subsequent rulings by Judge Holtzoff soon diluted even further his "affirmative acts" proscription. Several suits were heard before Judge Holtzoff in September of 1966 testing various means by which the railroads have been effecting additional firemen reductions after the Award. The Judge in each case permitted additional reductions by the very "affirmative steps" he had earlier seemed to prohibit.[10] All such unilateral railroad acts to reduce the ranks of the firemen are, of course, prohibited by the National

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[9] Thus, the Court rejected the BLF&E argument that after the Award "whenever any fireman dies, retires, or resigns, thereafter his position should be filled by a new appointment" (J.A. 224). The railroads, according to the Judge, are under no obligation "to fill future vacancies," because it is not required that "vacancies occurring by attrition after the [Award] termination date need be filled" (J.A. 224, 225).

[10] Among those rulings were approval of forced transfer of firemen from more desirable jobs (by vacating jobs manned during the Award) to less desirable jobs at distant places resulting in dollar savings to the railroads; indefinitely furloughing men without pay to reduce the firemen's ranks; "blanking" of runs newly created after the Award so as to operate them without a fireman; and similar measures. Judge Holtzoff's adverse rulings in these several respects, entered months after his issuance of the judgment in the underlying actions, were duly appealed by the BLF&E to the court below in *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor and Aroostock Railroad Company, et al., The Atchison, Topeka and Santa Fe Railway Company, et al.*, Nos. 20,472, 20,473, 20,909 and 20,910 and in *Brotherhood of Locomotive Firemen and Enginemen* v. *New York Central Railroad Co.*, No. 20,647. By stipulation of the parties those appeals have been held in abeyance pending the resolution of the underlying issue in this case.

Diesel Agreement; in approving them, the District Court was constrained to find that authority for such railroad action derives from the continuing impact and effect of the expired Award.

9. *The Ruling Below*

Unlike the District Court, the Court of Appeals resolves the collective bargaining issues against the railroads.[11] But like the District Court, it rejects the BLF&E's principal contention that fireman reductions effected under the Award do not survive its expiration; in its opinion of May 12, 1967, the court below holds that firemen positions vacated during the Award remain vacated after its expiration. And in its supplemental opinion of July 31, 1967, the court goes further and rules that jobs manned during the Award may be left vacant when a fireman leaves that position due to death, retirement, etc., after the expiration of the Award.[12]

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[11] Thus, the court finds (p. 21a, *infra*) that BLF&E Notice No. 1 was both timely and bargainable, and that in refusing to negotiate thereon the railroads "breached their statutory duty under the Railway Labor Act to confer and bargain on the merits of proposed changes in work rules."

[12] The court below did make clear in its supplemental opinion (p. 43a, *infra*) that all "new runs" established after the expiration of the Award must be manned by firemen and that full observance of the Diesel Agreement in "full crew" states continues to be required. The railroads filed a petition for rehearing against these rulings, which was denied by the court below on September 21, 1967 "without prejudice however to the [Arbitration] Board's seeking leave within thirty days from the date of this order to submit as amicus curiae a showing of respects, if any there be, in which the opinions of this court are inconsistent with the understanding of Board 282 as to the proper meaning and applicability of its award" (p. 52a, *infra*). On October 19, 1967, after hearing counsel for both the railroads and the BLF&E, Arbitration Board 282 declined to submit any such statement. On October 23, 1967, the railroads filed in the court below a motion to vacate that court's September 21st denial of their petition for rehearing, and to stay further proceedings while they requested Arbitration Board 282 to answer at their own invitation questions which the Board had declined to answer at the invitation of the court below. On November 9, 1967, the Court of Appeals denied (p. 53a, *infra*) this last effort of the railroads to overturn the part of the judgment below which went in the BLF&E's favor.

Severe in its impact on the firemen is the ruling that on a run operated with a fireman at the expiration of the Award, the carrier may subsequently refuse to replace him at death or retirement if the run had been designated for blanking before the Award expired. The court thereby permits the railroads to reduce even further the number of jobs requiring firemen (and thus the total number of working firemen) after the Award has expired. But even harsher in effect is the court's ruling that some 18,000 jobs vacated during the Award—half of the total number of existing firemen jobs in 1963 before the Award's promulgation—*remain permanently vacated even after the Award's expiration.* In that respect the court below approves the conclusion of the District Court "that the work rules in effect following the expiration of the Award in 1966 did not revert to the 1963 condition and that the new plateau of work rules . . . continued in effect . . ." (p. 5a, *infra*). This result the court below premises upon an analogy with contract modifications achieved by consent of the parties, which it asserts have continuing validity under the Railway Labor Act until modified by further bargaining (p. 14a, *infra*):

> "Our ruling is that the work rules created by the Award constituted a new plateau that was not automatically eroded when the Award expired . . . Certain work rules were in force on January 24, 1966 (or March 30, 1966, in the case of the BLFE). The mandate of the Railway Labor Act requires that the work rules in effect on any particular day shall also be in effect the following day—beyond the power of either party to institute a unilateral modification—subject to change only in accordance with the procedures prescribed by the Act. These procedures begin with the notices required by Section 6 to be served by any party seeking a change at least thirty days

> in advance of the proposed effective date of such change. This new-plateau reasoning applies even though the work rules are established by agreements of limited duration. 'The effect of § 6 is to prolong agreements subject to its provisions regardless of what they say as to termination.' It likewise applies even though the work rules are established by an arbitration award of limited duration."

Of course, in holding by an analogy to voluntary contract modifications that the expired Award has continuing effect, the court is constrained to reject both the plain meaning and the legislative history of Public Law 88-108. Thus, the court concedes (p. 14a, *infra*) that the Brotherhood's statutory argument "has a kind of formal logic, and certain provisions of Public Law 88-108 could be read this way." And the court similarly concedes that "The National Diesel Agreement was not set aside by the Board. As already noted the opening section of the Award provided that agreements in force continued in effect except as they were modified by the Award. The Award provided a procedure for modifications during the two-year life of the Award." But the court tenders the following rationalization (p. 15a, *infra*) for its rejection of the "formal logic" of plain meaning, the legislative history, and the expressly delimited contract inroad of the Board's Award:

> "We think its [the BLF&E] construction of Public Law 88-108 would be unreasonable and inconsistent with the purposes and context of the legislation. It must have been reasonably contemplated that the Board of Arbitration might order deflation of the scope of existing overmanning. And it seems obvious that an automatic rescinding of any such pruning at the instant the Award was to terminate would spark the most unsettling havoc. To reach this result would

necessarily mean trying to recreate a practically unrecoverable situation and sweeping away a host of rights that had already vested concomitant with the award, made final under the Act, permitting reductions in the work force."

Thus, the nub of the court's rejection of plain meaning is its reliance on a presumed Congressional intention permanently to reduce the firemen's ranks through the limited-life Award. But the court cites no legislative evidence of any sort for that crucial Congressional intention. Instead, it states that it *"must have been reasonably contemplated"* by Congress that *"deflation"* of the number of firemen would be permanently effected by the interim Award.

The court gives a remarkable explanation for preferring its *supposedly self-evident* surmise of what Congress "must have" contemplated to the statutory expiration clause's plain meaning and the consistent legislative history. It states (p. 14a, *infra*) that concerning the question of job rights obtaining upon the Award's expiration *"Congress was undoubtedly aware of the problem but apparently thought wisdom lay in avoidance of express delineation."* Thus, in rejecting plain meaning on the basis of a wholly *presumed* Congressional intention, the court below explains that Congress thought "wisdom lay in avoidance of express delineation" of its intent. In Congressionally-respectful but unmistakable terms the court appears to be saying that Congress was afraid to express its intent permanently to reduce the number of firemen under a temporary arbitration law, but hoped that the courts would reject the plain meaning of its statutory termination date and its repeatedly-expressed temporary purpose and give effect to a surmised intent. By this remarkable sleight of hand, half of the total number of firemen become *permanently displaced* under an unprecedented interim arbitra-

tion law approved after assurances by the Congressional leadership that upon its expiration the status quo would be *"as if this resolution had never been passed"* (p. 8, *supra*). Entirely disregarded is the Senate Committee's emphasis that the expiration clause was intended "to closely limit the scope and impact" of the Congressional intrusion (p. 6, *supra*). And since even the Arbitration Board *itself* never indicated an intention to make its job reductions effective after expiration of the Award, the conjury of the court below is doubly remarkable—both the rabbit and the hat are revealed as products of judicial invention.

* * * * *

By the ruling below, the interim and strictly limited compulsory arbitration experiment which Congress adopted with reluctance, has been transformed into a continuing abolition of workers' jobs. We do not, however, urge this Court's review solely because the court below has erroneously resolved an important statutory issue. Rather we emphasize as reason for review that judicial intrusion upon the delicate political balance Congress struck in this unprecedented statute invokes a sensitive issue in the relationship of the federal courts and the Congress; that circumstance particularly requires the attention of the nation's highest tribunal.

Reasons for Granting the Writ

AN IMPORTANT QUESTION FOR THIS COURT'S REVIEW IS PRESENTED BY THE LOWER COURT'S REJECTION OF THE PUBLIC LAW'S PLAIN MEANING AND LEGISLATIVE HISTORY, SUPPLANTING THE SENSITIVE CONGRESSIONAL COMPROMISE WITH A JUDICIALLY-IMPROVISED SUBSTITUTE.

This Court has most recently emphasized that in an era of "automation and onrushing technological change, no problems in the domestic economy are of greater concern

than those involving job security and employment stability", which have engaged general attention "because of the potentially cruel impact upon the lives and fortunes of the working men and women of the Nation . . ." (*Woodwork Manufacturers* v. *NLRB*, 386 U.S. 612, 640). Within this area of grave national concern, this case presents an important federal question of legislative-judicial relationships. Accentuating the importance of that question is the consideration that this Court's resolution of the central issue herein will be dispositive or controlling in a large volume of pending federal litigation involving ancillary issues concerning the continued effect, if any, of the expired Award.[13]

1. *Rejection of the Public Law's Manifest Intent.* In 1963 under the stress of a national emergency, Congress enacted an unprecedented compulsory arbitration measure on the basis that its effect would not exceed two years. As the court below admits, Congress "hoped and expected" that in the two-year period the parties would voluntarily and finally resolve the underlying issue. As the court below also finds, that expectation was frustrated by the railroads' violation of their statutory duty (and indeed their express promise to Congress) to negotiate the fireman

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[13] Pending in the District of Columbia Court of Appeals (p. 16, *supra*) are five appeals, Nos. 20,472, 20,473, 20,909 and 20,910 involving firemen orders issued by the District Court subsequent to the judgments involved herein in *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor & Aroostook Railroad Co., et al., The Atchison, Topeka and Santa Fe Railway Company, et al.*, and No. 20,647, *Brotherhood of Locomotive Firemen and Enginemen* v. *New York Central Railroad Company*. Pending in the 5th Circuit are Nos. 23,622 and 23,815, *Brotherhood of Locomotive Firemen & Enginemen* v. *United States ex rel Central of Georgia Railway Company and Southern Railway Company*, and *Brotherhood of Locomotive Firemen and Enginemen* v. *Central of Georgia Railway Company and Southern Railway Company*. Pending in the 6th Circuit is No. 17,588, *Brotherhood of Locomotive Firemen and Enginemen* v. *Louisville & Nashville Railway Co.* Cases which would be disposed of or materially affected in which the BLF&E is plaintiff or defendant are also pending in United States District Courts in the District of Columbia (No. 3364-66), the Eastern District of Pennsylvania (No. 42,178), the Northern District of Indiana (No. 4803), and the Western District of Pennsylvania (No. 27-67 Erie).

issue with the union during the life of the Award. The principal cause of the necessary return to the status quo ante was thus the railroads' own refusal to bargain on the BLF&E's new contract offer of sizeable reductions in the ranks of the firemen.[14] Nevertheless, the court below, repelled by its view of the practical impact of a situation created by the railroads themselves, rejects the plain meaning of the statute which would require the railroads to hire replacements for the 18,000 firemen they separated during the life of the Award. Its ground for rejection is the *practical effect* of enforcing strictly the termination provision which would require return to the pre-existing fireman manning requirements.

It is unnecessary to belabor the impropriety of the lower court's statutory interpretation. As we have shown (*supra*, pp. 5-10), that the Award's effect would be wholly temporary and that collective bargaining alone would supply a solution thereafter, was not only manifested by the plain terms of the statute's expiration provision, but by the entire legislative history. This Court emphasized in *Carpenters' Union* v. *Labor Board*, 357 U.S. 93, 100, that particularly in the area of the delicate compromises in our labor law between strong contending forces, there is no warrant for replacing what Congress has written with "broad policy," for ". . . it is the business of Congress to declare policy and not this Court's. The judicial function is confined to applying what Congress has enacted after ascertaining what it is that Congress has enacted." That ascertainment permits recourse to judicial judgment "within the limits

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[14] Significantly, the court below twice refers (*infra*, p. 25a and p. 31a, n. 48) to the 6,000-man reduction in the number of firemen under BLF&E's Notice No. 1 of November 1965, but it brushes off this concession as negligible because the railroads actually separated some 18,000 firemen during the Award. However, the court itself (p. 41a, n. 1, *infra*) cites the testimony of Arbitration Board Chairman Seward that the Board had anticipated a reduction of only some 5,500 firemen. Thus the 6,000-man reduction offered by the Brotherhood was actually a concession at the very *outset* of bargaining of *more* than the Board itself had expected in firemen reductions under its Award.

of the relevant legislative materials. Most relevant, of course, is the very language in which Congress has expressed its policy . . ." (*ibid.*).[15]

Recent federal labor statutes—results of "conflict and compromise between strong contending forces and deeply held views" (*id.* at 99)—have proved needful of this Court's protection from distortive adjudicatory expansion. See, *e.g.*, *Woodwork Manufacturers* v. *NLRB*, 386 U.S. 612; *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195. Faced with an argument based on practical considerations far stronger than the railroads advance here, this Court in *Atkinson* condemned the "startling proposition" that Congress "was willing to confer a power upon the courts to 'accommodate' . . . [the Norris-LaGuardia Act] out of existence whenever they might find it expedient to do so . . ." (*id.* at 209). No less startling and worthy of this Court's review is the action of the court below substituting its own conception of a "practical result" to accommodate the Public Law's termination clause out of existence.

2. *Conflict with this Court's* Rock Island *Decision.* In *Engineers* v. *Chicago, R.I. & P.R. Co.*, 382 U.S. 423, this Court itself emphasized the sharply delimited period of the compulsory intrusion by Public Law 88-108 upon the

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[15] This Court has applied and characterized the plain meaning rule in the following terms: "the courts, in interpreting a statute, have some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results • • • or would thwart the obvious purpose of the statute.' *Helvering* v. *Hammel*, 311 U.S. 504, 510-511, cf. *Commissioner* v. *Gillette Motor Co.*, 364 U.S. 130, 134, and *Commissioner* v. *P. G. Lake, Inc.*, 356 U.S. 260, 265. But it is otherwise 'where no such consequences would follow and where • • • it appears to be consonant with the purposes of the Act • • •' [citations]". *Commissioner* v. *Brown*, 380 U.S. 563, 571. Courts must "apply statutes on the basis of what Congress has written, not what Congress might have written". *U.S.* v. *Great Northern R. Co.*, 343 U.S. 562, 575. The court cannot "speculate about a Congressional purpose for which there is no support" in the legislative text or history. *U.S.* v. *Public Utilities Comm'n*, 345 U.S. 295, 311.

pre-existing status quo. There the railroads argued before this Court (Brief, pp. 20, 60) that the effect of the Award would not terminate on the date specified because Congress integrated the arbitration under P.L. 88-108 into the Railway Labor Act so that the rules and procedures established by the Award would continue to apply after the expiration of the Award until changed in accordance with that Act. Indeed, with respect to the status of the full crew laws, the railroads urged (Brief, p. 59) the very rationale espoused by the ruling of the court below in the present case—that "when Congress directed the Board to make a 'complete and final disposition' (P.L. 88-108, § 3) of the fireman and crew consist issues, it knowingly authorized a long-range solution, not one which could be cast aside two years later by reactivation of the full crew laws . . .".

In rejecting these arguments this Court's *Rock Island* decision emphasized President Kennedy's "hope that the dispute could eventually be settled by collective bargaining" (at p. 431); that the Presidential proposal expressed "no desire to have Congress pass a law that would finally and completely dispose of the problem" (at p. 432); and that "Congress wanted to do as little as possible in solving the dispute which was before it", providing only an "interim remedy" for "a period not exceeding two years from the date the awards would take effect" (at pp. 431, 433). The legislative intent emphasized by this Court in *Rock Island* most strongly reinforces the plain meaning of the statute's Award-expiration clause. Integral to the *ratio decidendi* of this Court's *Rock Island* opinion is the proposition, rejected by the court below here, that the intrusion on the pre-existing status quo was fully terminated upon the expiration of the statutory Award.

3. *Conflict with a Basic Congressional Tenet.* In giving continuing effect to manning reductions accomplished under

what Congress enacted as a strictly temporary measure, the court below approves what Congress for more than four decades has repeatedly refused to enact. Time and again in the enactment of federal labor laws since the Railway Labor Act of 1926, Congress has emphasized its opposition to compulsory arbitration of labor disputes—a view reflected again in 1963 in Congressional approval in an emergency situation of no more than an interim arbitral intrusion upon collective bargaining.

In 1926, and again in 1934, Congress enacted laws governing railway labor.[16] Yet on both those occasions, Congressional antipathy to compulsory arbitration of collective bargaining disputes precluded any serious consideration of such a provision. The Railway Labor Act significantly highlights this antipathy: it provides that once an agreement has been reached, "minor disputes" as to its meaning are subjected to compulsory arbitration by the National Railroad Adjustment Board (45 U.S.C. § 153). But resolution of "major disputes" as to what the contract *shall* contain was specifically left voluntary (45 U.S.C. § 157), in accord with the overwhelming sentiment of both the Congress and the country.[17] In both 1926 and 1934 support for voluntarism and opposition to compulsion came from labor and management, from government officials and private citizens, from political party platforms,

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[16] Railway Labor Act, ch. 347, 44 Stat. 577 (1926); Railway Labor Act, ch. 691, 48 Stat. 1185 (1934).

[17] Some indication of the depths of this sentiment may be found in the heated—and successful—opposition to a minority proposal to give powers of compulsory process to such a voluntarily established arbitration board. See, *e.g.*, Hearings on S. 2306 before the Senate Committee on Interstate Commerce, 69th Cong., 1st Sess. 184 (1926) (testimony of the counsel for the Organized Railway Employees); 67 Cong. Rec. 4569 (remarks of Representative Rayburn); 67 Cong. Rec. App. 9162 (daily ed. May 11, 1926) (remarks of Senator Watson, Chairman of the Committee); Hearings on H.R. 7650 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 67 (1934) (testimony of the Chairman, U.S. Board of Mediation).

and from congressmen.[18] As this Court emphasized in the context of this very dispute, "the Railway Labor Act . . . does not undertake governmental regulation of wages, hours, or working conditions." *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284, 289.

Congress' concern to protect the principle of voluntarism was manifested even more strongly in 1932 when it enacted the Norris-LaGuardia anti-injunction act.[19] Although compulsory arbitration *per se* was not an issue, its rejection was implicit in the enactment of legislation whose "raison d'etre" was the protection of labor's right to strike for a collectively-bargained contract free from "government by injunction."

In the 1935 National Labor Relations Act Congress once again reaffirmed its opposition to pre-contract compulsion. Section 13, affirming the sanctity of the right to strike,[20]

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[18] See, *e.g.*, Hearings on S. 2306, *supra*, n. 17, at 160 (testimony of D. Willard, Pres., B&O Railroad), 169 (letter from R. Easley, Chairman, National Civic Federation), 193 (testimony of E. Rich, representing six manufacturers' associations), 199, 213 (testimony of J. Emery, counsel, N.A.M.), 222 (letter of W. Green, Pres., AF of L); 67 Cong. Rec. 4225, 4231 (daily ed. Feb. 24, 1926) (remarks of Reps. Nelson and Mapes); 67 Cong. Rec. App. 4594, 4596, 4600 (daily ed. Mar. 2, 1926) (remarks of Rep. Barkley); 67 Cong. Rec. 4283 (daily ed. Feb. 25, 1926) (remarks of Rep. Rayburn); 67 Cong. Rec. (daily ed. Feb. 26, 1926) at 4348 (remarks of Rep. Jacobstein), 4355, 4356 (remarks of Rep. Hawes), 4363, 4364 (remarks of Rep. Beedy), 4368 (remarks of Rep. Parker, Chairman of the Committee); 67 Cong. Rec. 4400 (daily ed. Feb. 27, 1926) (remarks of Rep. Newton); 67 Cong. Rec. App. 4603 (daily ed. Mar. 2, 1926) (remarks of Rep. Greenwood); 67 Cong. Rec. App. (daily ed. Mar. 3, 1926) at 4675 (remarks of Rep. Ellis), 4677 (remarks of Rep. Carss); 67 Cong. Rec. App. 4836, 4837 (daily ed. Mar. 5, 1926) (remarks of Rep. Robsion); Hearings on H.R. 7650 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. (1934) at 58 (testimony of J. Eastman, Federal Coordinator of Transportation), 118 (brief for the International Brotherhood of Teamsters). See also the National Republican Party Platform of 1924, (quoted by Rep. Cooper in 67 Cong. Rec. 4220, daily ed. Feb. 24, 1926), and the National Democratic Party Platform of the same year.

[19] 29 U.S.C. §§ 101-115 (ch. 90, 47 Stat. 70).

[20] "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike" (29 U.S.C. § 163).

was a reavowal of the conviction that forcible governmental intrusion is not desirable in the heat of a conflict over workers' economic rights. The policy against compulsory intrusion was underlined and applied to preempt state authority in *Automobile Workers* v. *O'Brien*, 339 U.S. 454, relying strongly on Senator Taft's emphasis that "there is a right to strike and that labor peace must be based on free collective bargaining." And integral to creation of the new National Labor Relations Board was the assurance given by the Senate Committee that the Board would not "compel the making of agreements" or dictate their terms, an assurance renewed in the 1947 enactment of Section 8(d) of Taft-Hartley. See *Labor Board* v. *American Ins. Co.*, 343 U.S. 395. Moreover, in the 1947 amendments Section 13 protecting the right to strike was preserved. And the one respect in which an inroad was made on collective bargaining options—the 90-day cooling off period in a national emergency—authorized merely an extension of the period of private negotiation rather than compulsory dictation of terms to the parties.

Against the background of this historical Congressional antipathy to compulsory labor arbitration, the ruling below giving permanence to a temporary statutory Award does not merely disturb Congressional intent on some peripheral issue. In enacting the Public Law, Congress was willing to put a toe in the waters of compulsory arbitration but the court below plunges in head-deep. The resulting statute, altered in its essential limitation and premise, is one that President Kennedy would not have sponsored and the 1963 Congress would not have enacted.

4. *Impugning of the Statute by Judicial Legislation.* In 1963 Congress was presented with President Kennedy's appeal for temporary legislation to avert a threatened national emergency arising chiefly from the fireman manning dispute. In so delimiting his proposal, President Kennedy was evidencing political realism: compulsory

arbitration might be required for the national good, but it was anathema to Congress; how best surmount this obstacle and induce cooperation? The answer was to ask no more than was absolutely necessary. This the President did; Congress understood it as such and enacted what was asked for but no more. Never in the history of Public Law 88-108 was there even a hint that it would have permanent effect. And, we submit, President Kennedy appraised the situation accurately: a less circumscribed, more extensive bill would have been defeated by deep-rooted Congressional aversion to compulsory arbitration.

In bypassing these realities, the court below rests its interpretation on presumed after-the-fact practicalities. By contrast, the Public Law itself was an intensely and uniquely political document. The underlying political foundation of the law was its two-year limitation. When it gives continuing effect to the Award, the court below erodes the founding premise for enactment of the entire statute, for it sanctions the very thing which Congress was most zealous to avoid. This Court, we submit, should not leave undisturbed a ruling which impugns the Public Law itself by emasculating its keystone limitation.

5. *Comity Considerations Call for High Court Review.* We have emphasized that the ruling below distorts the delicate political balance Congress struck in its first and limited experiment with compulsory labor arbitration. But there is ground for this Court's review irrespective of the rightness or wrongness of the Circuit Court's ruling. For the court below, asserting that Congress purposely left a gap in the statutory scheme, frankly embarks on a process of judicial legislation to fill the supposed void. That process, even if properly undertaken, invokes delicate relationships between the federal courts and the Congress requiring this Court's considered attention. This emergency Public Law was the result of a narrow Congressional compromise

in an area fraught with heated political controversy. If that Congressional compromise requires extension through a process of judicial legislation, surely it is this Court which should shoulder the ultimate burden. Comity toward and respect for the prerogatives of a coordinate branch call for the highest Court to render the judgment if a narrow and delicate Congressional balance on a vital public issue requires judicial revision.

This Court has frequently granted review where lower court rulings—presenting "delicate problems which call for the judgment of the nation's ultimate tribunal" [21]—touch upon the prerogatives and functions of the Congress, the Executive, foreign sovereignty or state authority. See, *e.g.*, *Coleman* v. *Miller*, 307 U.S. 433; *United States* v. *Mine Workers*, 330 U.S. 258; *United States* v. *Morgan*, 307

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[21] Justice Frankfurter (dissenting) in *Ex Parte Peru*, 318 U.S. 578, 602. The *Peru* case itself highlights this Court's role where sovereign prerogatives are at stake. There this Court employed its "all writs" power and ordered a District Court to release a foreign vessel after the Executive branch had undertaken to settle the underlying issue by diplomatic negotiation. This Court (at p. 587) declined to await Circuit Court review or even a District Court judgment before exercising its power because "it is of public importance that the action of the political arm of the Government taken within its appropriate sphere be promptly recognized . . ." The Court's appreciation of its unique role is highlighted by the objection in the dissenting opinion (at p. 601) that the vessel already having been released, what was at stake was merely "the propriety of vindicating the dignity of a friendly foreign state."

This Court's role in cases involving considerations of comity is also recognized in the Constitution (see Article III, § 2, cl. 2) and in 28 U.S.C. § 1252. That statute, which provides direct appeal from judgments invalidating acts of Congress, was enacted in 1937 "chiefly as a result of the furor created by invalidation of Congressional legislation by lower federal court judges." Robertson & Kirkham, *Jurisdiction of the Supreme Court* 210 (1951 ed.). The considerations of Congressional dignity and prerogative which underlie direct review of lower court rulings striking down acts of Congress are equally invoked where intrusion on the will of the Congress may result from an elaborate exercise in judicial legislation.

U.S. 183; *In re Neagle,* 135 U.S. 1; *Missouri* v. *Holland,* 252 U.S. 416; *McCulloch* v. *Sociedad Nacional,* 372 U.S. 10; *Graves* v. *New York,* 306 U.S. 466; *Watkins* v. *Conway,* 385 U.S. 188. There is reflected in those cases this Court's special role in assuring that principles of comity and separation of powers command judicial respect where sovereign or coordinate branch prerogatives are at stake. As the Court noted in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 407 (involving judicial recognition of a Cuban expropriation decree): "We granted certiorari because the issues involved bear importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area."

The ultimate importance of review in this case thus rests on more than the need to vindicate the clear Congressional intention which the court below has eroded by giving continuing effect to an interim statutory Award. For even if (contrary to our contention) the lower court correctly reads the Congressional goal, there then arises the necessity of defining by a blend of contractual and statutory rights the extent to which the Public Law Award affects working rights after its expiration. Comity requires this Court itself to undertake so sensitive an exercise in judicial elaboration on the first Congressional experiment with compulsory labor arbitration.

Conclusion

For the reasons stated herein we urge that the writ should be granted.

Respectfully submitted,

JOSEPH L. RAUH, JR.
JOHN SILARD
HARRIETT R. TAYLOR
Rauh and Silard
1001 Connecticut Ave., N.W.
Washington, D.C. 20036

ISAAC N. GRONER
STEPHEN E. MOSS
Cole and Groner
1730 K Street, N.W.
Washington, D.C. 20006

HAROLD C. HEISS
DONALD W. BENNETT
Heiss, Day and Bennett
Keith Building
Cleveland, Ohio 44115
Attorneys for Petitioner.

Of Counsel:

ALEX ELSON
WILLARD J. LASSERS
AARON S. WOLFF
Elson, Lassers and Wolff
11 South LaSalle Street
Chicago, Illinois 60603

APPENDIX A: OPINIONS AND JUDGMENT BELOW

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,152

BROTHERHOOD OF RAILROAD TRAINMEN, SWITCHMEN'S UNION OF NORTH AMERICA, et al.,

Appellants

v.

THE AKRON & BARBERTON BELT RAILROAD COMPANY, et al., *Appellees*

No. 20,158

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN,

Appellant

v.

THE AKRON & BARBERTON BELT RAILROAD COMPANY, et al., *Appellees*

No. 20,172

THE AKRON & BARBERTON BELT RAILROAD COMPANY, et al., *Appellants*

v.

BROTHERHOOD OF RAILROAD TRAINMEN, et al.,

Appellees

No. 20,215

BANGOR AND AROOSTOOK RAILROAD COMPANY, et al., *Appellants*

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Appellee*

No. 20,216

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., *Appellants*

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Appellee*

No. 20,229

BROTHERHOOD OF RAILROAD TRAINMEN, *Appellant*

v.

THE AKRON & BARBERTON BELT RAILROAD COMPANY, et al., *Appellees*

No. 20,191

THE AKRON & BARBERTON BELT RAILROAD COMPANY, et al., *Appellants*

v.

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, *Appellee*

No. 20,192

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Appellant*

v.

BANGOR AND AROOSTOOK RAILROAD COMPANY, et al., *Appellees*

No. 20,193

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Appellant*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., *Appellees*

No. 20,249

BROTHERHOOD OF RAILROAD TRAINMEN, *Appellant*

v.

THE AKRON & BARBERTON BELT RAILROAD COMPANY, et al., *Appellees*

Appeals from the United States District Court for the District of Columbia

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Decided May 12, 1967

Mr. Milton Kramer was on the brief for appellants in Nos. 20,152, 20,229 and 20,249 and appellees in No. 20,172.

Mr. James D. Hill for appellant in No. 20,158 and appellee in No. 20,191.

Mr. Joseph L. Rauh, Jr., with whom *Messrs. John Silard, Daniel H. Pollitt, Isaac N. Groner, David Epstein* and *Stephen E. Moss*, were on the brief for appellant in Nos. 20,192 and 20,193 and appellee in Nos. 20,215 and 20,216.

Mr. Francis M. Shea, with whom *Mr. Richard T. Conway* was on the brief for appellants in Nos. 20,172, 20,191, 20,215 and 20,216 and appellees in Nos. 20,152, 20,158, 20,192, 20,193, 20,229 and 20,249. *Messrs. David Booth Beers* and *Ralph J. Moore, Jr.*, also entered appearances for appellants in Nos. 20,215 and 20,216.

Before DANAHER, *Circuit Judge*, BASTIAN, *Senior Circuit Judge*, and LEVENTHAL, *Circuit Judge*.

LEVENTHAL, *Circuit Judge:* This opinion deals with a number of appeals and cross-appeals in the railroad work rules litigation.

It may help if at the outset we indicate generally the nature of our views, though their precise exposition and the complexity of the issues require a long opinion. Part I of this opinion reviews the history of the passage by Congress in 1963 of a law providing for compulsory arbitration of the work rules controversy with an Award of two

years duration. In Part II we approve the conclusion of the District Court that the work rules in effect following the expiration of the Award in 1966 did not revert to the 1963 condition and that the new plateau of work rules, established for early 1966 by the Award, continued in effect unless changed in accordance with the Railway Labor Act. In Part III, reversing a ruling of the District Court, we hold that even prior to the expiration of the Award the carriers had a statutory duty to respond to notices of the unions and begin collective bargaining about the rules to become effective following the expiration of the Award. In Part IV we conclude, reversing the District Court, that the railroad companies violated their duty to bargain with the Firemen, on the notice relating to prospective work rules, and with the Trainmen. We affirm other aspects of the decree, albeit for reasons somewhat different from those of the District Court, since we conclude that the railroads had no statutory duty to bargain over either another notice served by the Firemen, which sought to undermine rights vested under the Award, or the early notice served by the Conductors.

I

Understanding of the issues will be aided by a historical review of the problem.

The phenomenal growth of railroads in the 19th century was accompanied by evolution of complementary employee organizations. Railroad workers were among the first to organize unions to present employee demands collectively. The Order of Railway Conductors was founded in 1868, the Brotherhood of Railroad Firemen and Enginemen in 1873, and the Brotherhood of Railroad Trainmen in 1883. Labor relations in the railroad sphere has been the subject of Congressional enactments, and is now governed essentially by the Railway Labor Act.[1]

The last hundred years have also witnessed the evolution of an elaborate "common law" embracing the relations of railroad management and labor. There exists a roughly defined system that is the product of long-established practices and understandings, collective bargain-

[1] 45 U.S.C. §§ 151-63 (1964), as amended, 45 U.S.C. § 153 (Supp. II, 1966).

ing agreements, court decisions and administrative orders. The system covers among other things the manning of trains and the assignment of tasks to employees. These principles and patterns of behavior are collectively denominated "work rules."[2] As the Supreme Court has aptly put it, the railroad industry with its complex of regulations is virtually a "state within a state."[3]

Work rules concerning firemen date from the early days of the industry. Their initial chore was to select and load fuel into the wood-burning locomotive. The appearance in the late 1920's of the diesel engine spawned the problems that beset the industry to this day. The carriers consistently contended that the former loaders of wood were now merely dead wood. Yet beginning in 1933 the Brotherhood of Locomotive Firemen and Enginemen (hereafter BLFE) negotiated individual agreements with various carriers to preserve the continued status of firemen-helpers. The BLFE in 1937 joined with substantially all United States carriers in signing the National Diesel Agreement, providing for the employment of firemen-helpers on practically all diesel powered locomotives. Similar terms endured in subsequent contracts, including the Diesel Agreement of 1950.

While work rules retaining positions for firemen became thus established, the industry's quest for modernization resulted in almost one hundred percent diesel operation. In 1956 the carriers gave hint that intense competition from other modes of transport and the resulting financial pressure would no longer permit preservation of the ancient status. During negotiations on their proposal to give management the discretion to determine the employment of firemen the carriers withdrew this plan by agreeing to a three-year moratorium on such changes in work rules. But the die had been cast, and the carriers argued that the verdict of history and technology had come in, pronouncing railroad firemen extraneous members of a train crew. So too, they asserted, advanced technology

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[2] *See generally* Comment, *The Railway Work Rules Dispute—A Precedent for Compulsory Arbitration*, 14 DE PAUL L. REV. 115 (1964).

[3] *See* Whitehouse v. Illinois Cent. R.R., 349 U.S. 366, 371 (1955), quoted by Fortas, J., dissenting in Transportation-Communication Employees Union v. Union Pac. R.R., 385 U.S. 157, 176 n.5 (1966).

and innovations would permit sharp reductions in the level of what is called the "crew consist," specifically the number of brakemen needed for the safe operation of the train.

It is against the backdrop of the always "sensitive and touchy problem"[4] of overmanning and efforts to overcome it that we focus on the events more immediately leading up to these appeals. In 1959 the carriers served notices under Section 6 of the Railway Labor Act,[5] proposing the elimination of firemen from freight and yard service, and the abrogation of regulations fixing the size of train crews. The following year, 1960, the unions served a series of counter-proposals directed at continuing and even extending the use of firemen and at setting the crew consist level at not less than one conductor and two brakemen plus such additional trainmen as the assurance of maximum safety demanded.

Shortly thereafter, in an effort to aid in the adjustment of this dispute, President Eisenhower appointed a special Presidential Railroad Commission to study the various facets of the problem. This Commission issued its report and recommendations in 1962. In general the carriers accepted the findings, but the unions balked.

Meanwhile, the lengthy procedures contemplated and mandated by the Railway Labor Act continued. Negotiations and mediation failed to bridge the gulf between the parties. The atmosphere of crisis heightened, for the Supreme Court ruled in March of 1963 that all the tools

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[4] Brotherhood of Locomotive Engineers v. Chicago, Rock I. & Pac. R.R., 382 U.S. 423, 430 (1966).

[5] 45 U.S.C. § 156 (1964): Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

of the Act prescribed for the parties had been tried and found inadequate, and they were thus free to resort to self-help: that is, the unions could lawfully strike, or the carriers could unilaterally impose the new rules.[6]

The last device in the statutory arsenal was invoked. Acting under Section 10 of the Railway Labor Act, 45 U.S.C. § 160, the President, on a finding by the National Mediation Board of the threat of deprivation of essential transportation services, convened an Emergency Board to make a prompt investigation and report. For thirty days following the rendition of such a report no party may take unilateral action. The investigation was made and the report was filed.

Once again the unions proved unwilling to accede to the recommendations of others. During July of 1963 a flurry of tense negotiations was spurred by the active intervention of President Kennedy and the participation of Secretary of Labor Wirtz. The unions rejected the President's proffer of the services of Justice Arthur Goldberg as arbitrator of the dispute. For a fleeting period it appeared that voluntary arbitration would provide the answer, but though the parties indicated willingness in principle they could not get together in the procedural particulars of arbitration.

A strike was imminent. The country was faced with a serious emergency. No outstanding techniques remained to move the antagonists to a responsible accord. Only Congress could avert a national catastrophe, and it was to Congress that President Kennedy turned for unprecedented measures.[7] The Administration proposal, submitted July 22, 1963,[8] would have authorized the Interstate Commerce Commission to serve, in effect, as the agency for compulsory settlement of the threat by empowering it to put into effect, on the application of the parties, any of the changes proposed in the notices of 1959 and 1960 with such modification as it found appropriate in reconciling the private and public interest. That

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[6] Brotherhood of Locomotive Engineers v. Baltimore & O.R.R., 372 U.S. 284, 290-91 (1963).

[7] *See Message from the President of the United States Relative to Railroad-Labor Dispute*, H.R. Doc. No. 142, 88th Cong., 1st Sess. (1963).

[8] S. J. Res. 102, 88th Cong., 1st Sess. (1963).

resolution made it clear that these were to be only interim work rules to be effective until the parties themselves agreed on more permanent terms, but in no event to last for more than two years.

The law that was actually passed differed in various particulars from the Administration measure. The "one significant change"[9] made was the substitution of an independent *ad hoc* board of arbitration for the Interstate Commerce Commission, principally for the reason that Congress wanted to emphasize the peculiar and non-precedential nature of its emergency intervention. By August 28, 1963, this unique compulsory arbitration law, Public Law 88-108, had passed both Houses of Congress and received presidential approval. We set out this statute in an appendix to this opinion.

Public Law 88-108 expressly forbade any unilateral self-help by the parties who had served or received the notices of 1959 and 1960. It created a Board of Arbitration (since designated Board 282), to be composed of seven members, two each representing the carriers and unions, and the other three to be selected by the President if, as happened, the parties could not agree even on mutually acceptable neutral members. The Board was ordered to pass on the two focal issues of the use of firemen and the size and composition of train crews. The Award (since designated Award 282) was to "be binding on both the carrier and organization parties to the dispute and . . . constitute a complete and final disposition of the aforesaid issues. . . ." (Section 3). The effective date of the Award was set at sixty days after filing in the United States District Court for the District of Columbia. According to Section 4 the Award was to "continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise."[10] It is this provision specifying the maximum

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[9] Brotherhood of Locomotive Engineers v. Chicago, Rock I. & Pac. R.R., *supra* note 4, 382 U.S. at 432.

[10] The measure was somewhat analogous to the legislative intervention in a 1916 rail dispute when Congress decreed that eight hours was to be the measure for a standard day in determining compensation, and forbade reduction in the standard day's wage until thirty days after findings were

mandatory duration that has sparked the issues we are now required to judge.

The Board met, held hearings, took evidence. It issued an Award that provided: 'This Award shall continue in force for two years from the date it takes effect, unless the parties agree otherwise.'' An important extension agreement is that of the carriers and BLFE, which extended the termination date to March 30, 1966. Except for such agreement the Award expired at the close of the two year period on January 24, 1966.[11]

Award 282 held that the nearly two hundred carriers involved could eliminate ninety percent of the firemen positions, and set forth a procedure for dismissal and attrition. It was a staggering blow to the BLFE. The Award did not, however, authorize a single spasmodic discharge of thousands of firemen. Indeed, in some aspects it was ''highly favorable to the employees,'' *see In re Certain Carriers, Etc.*, 229 F. Supp. 259, 261 (D.D.C. 1964). Thus the Award guaranteed permanent employment for life, or until retirement or resignation, for every fireman who had been in active service for more than ten years, with a comparable job insured for all with service of two years or more. Those firemen with less than two years seniority were accorded severance allowances, amounting in some cases to six months pay. Under the terms of this Award the carriers have pruned eighteen thousand firemen from their ranks, paid out some $36,000,000 in separa-

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announced by a special commission created to study this system, to report back in six-to-nine months. The Supreme Court upheld this statute, characterizing it as a form of compulsory arbitration that was "limited" to a "reasonable period" fixed by the statute. *See* Wilson v. New, 243 U.S. 332, 345, 346, 351 (1917); *Message from the President, supra* note 7, at 4-5; S. Rep. No. 459, 88th Cong., 1st Sess. 8 (1963).

[11] The parties and the District Court have all accepted and implemented the Award as effective January 25, 1964. With that date marking the first day of the two-year period it is clear that the full two-year period expired at the end of January 24, 1966. We see no valid basis for the assumption of the District Judge that the Award was in existence on January 25, 1966. It may be regrettable, but we consider the Award rendered on January 25, 1966, by a special board of adjustment with respect to a dispute between BRT and the Green Bay & Western Railroad Co. and Kewanee, Green Bay & Western Railroad Co. to be without legal significance, unless it has been adopted by agreement of the parties, a question not before us.

tion benefits, and provided comparable jobs to twelve hundred former firemen.

On the crew consist issue, the Board determined that a single national standard would be inappropriate. It ruled that no change in crew consist be made except pursuant to the Award. Then it provided that where existing work rules required more or less than two trainmen, any party might give notice of a proposed change. If after conferences were held by the local properties no agreement was forthcoming, the issue could be referred to a special board of adjustment created at the local level. The Award articulated a series of "guidelines" to be followed by these special boards in resolving particular disputes. Many crew consist agreements and special awards were made under this procedure.

Pursuant to Section 9 of the Railway Labor Act, 45 U.S.C. § 159 (1964), as incorporated by reference in Section 4 of Public Law 88-108, the unions sued in the District Court for the District of Columbia to impeach the Award. The attack was two-pronged. First, they contended that the statute authorizing compulsory arbitration in this context was unconstitutional as beyond the power of Congress, or in the alternative as delegating power to an administrative body without adequate specificity of standards. Second, the unions argued that the Award did not conform to the statute under which it claimed vitality. The District Court rejected both challenges, and both approved the statute and confirmed the Award. *Brotherhood of Locomotive Firemen* v. *Chicago, B. & Q. R.R.*, 225 F. Supp. 11 (D.D.C. 1964). This court affirmed,[12] 118 U.S.App. D.C. 100, 331 F. 2d 1020, and the Supreme Court denied certiorari, 377 U.S. 918 (1964).

In subsequent months there poured into the courts, here and elsewhere, a number of actions, some brought by unions and some by railroads, presenting a plethora of particular problems,[13] but these skirmishes need not

[12] One judge dissented on the ground that the constitutional issues should have been referred to a three-judge district court.

[13] These actions were largely concerned with the proper construction of the statute or award in regard to individual fact situations. *See, e.g.*, Brotherhood of Railroad Trainmen v. Certain Carriers, Etc., 121 U.S.App. D.C. 230, 349 F. 2d 207 (1965); Brotherhood of Railroad Trainmen v.

detain us. What is critical to the situation now before us is this. Instead of using the two-year period specified by Congress and the Award to continue meaningful negotiations looking toward long range adjustments of the various vexing problems, guided by the experience gleaned from functioning under the Award's interim rules, the parties apparently focused on whether the expiration of the Award would leave them in a better position than they might achieve by return to the collective bargaining table, where some concessions might have to be made.

The positions adopted by the parties, distilled to their essentials, were as follows: The Unions believed that upon expiration of Award 282, authorized by Congress as a "final" settlement for a period "not to exceed two years," it would have no continuing significance. They assumed that immediately upon the expiration of the Award the status quo ante would revive and the National Diesel Agreements would once more control. This position was shared by the other unions who presumed the prior crew consist rules would return from a two year consignment to limbo. But as a hedge the unions also, during the effective period of the Award, served notices proposing in substance that on termination of the Award there would come into effect rules that were substantially similar to the old work rules, with relatively minor adjustments.

Not surprisingly, the carriers took a different view. As they saw it, the status created by Award 282 had an enduring quality that transcended the formal effective period of that Award. But they too, "just in case," served counter-proposals on the unions to preserve the benefits the Award had carved for them. As will appear in greater detail, the carriers declined to discuss the merits of any of these notices at the few conferences that were held prior to the termination of the Award, reasoning that although Public Law 88-108 and the Award permitted bar-

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Chicago, M., St. P. & Pac. R.R., 120 U.S.App.D.C. 295, 345 F. 2d 985 (1965); Atchison, T. & S.F.Ry. v. Brotherhood of Railroad Trainmen, 324 F. 2d 899 (7th Cir. 1963); In re Certain Carriers, Etc., 231 F. Supp. 519 (D.D.C. 1964); Brotherhood of Railroad Trainmen v. Missouri Pac.R.R., 230 F. Supp. 197 (E.D.Mo. 1964); In re Certain Carriers, Etc., 229 F. Supp. 259 (D.D.C. 1964).

gaining during that period they nevertheless stopped short of imposing a legal duty to do so. These are the two central questions of these appeals: What rules were in force the day after Award 282 expired? What was the duty of the parties to bargain about changing those rules, and when did it arise?

These appeals reach us from the orders disposing of suits and counter-suits seeking declaratory and injunctive relief, brought by the carriers and by the Brotherhood of Locomotive Firemen and Enginemen (BLFE), the Brotherhood of Railroad Trainmen (BRT), and Switchmen's Union of North America (SUNA), and the Order of Railway Conductors and Brakemen (ORCB). *See generally Bangor & A.R.R.* v. *Brotherhood of Locomotive Firemen,* 253 F. Supp. 682 (D.D.C. 1966) (Nos. 20192, 20193, 20215, and 20216); *Akron & B. Belt R.R.* v. *Brotherhood of Railroad Trainmen,* 250 F. Supp. 691, 252 F. Supp. 207 (D.D.C. 1966) (Nos. 20152, 20172), *supplemented,* 254 F. Supp. 306 (D.D.C. 1966) (Nos. 20229, and 20249); *Akron & B. Belt R.R.* v. *Order of Railway Conductors,* 253 F. Supp. 538 (D.D.C. 1966) (Nos. 20158 and 20191).[14]

II

In advance of the trial of these cases, the parties consented to the preliminary adjudication of the effect of the expiration of Award 282. In a guideline opinion underlying subsequent rulings, the District Court held that, even though the Award formally terminated, it had created a "new plateau" of work rules, which were to continue in force until changed pursuant to the regular procedures of the Railway Labor Act.[15] See *Akron & B. Belt R.R.* v. *Brotherhood of Railroad Trainmen,* 250 F. Supp. 691, 695-97 (D.D.C. 1966).

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[14] Appeal No. 20316, Brotherhood of Locomotive Firemen (and H. E. Gilbert) v. Bangor & A.R.R., arises from an adjudication of contempt for violating a temporary restraining order. Although it was argued together with these cases, it presents different questions and is being considered separately. *See* Bangor & A.R.R. v. Brotherhood of Locomotive Firemen, 255 F. Supp. 476 (D.D.C. 1966).

[15] *Compare* Manning v. American Airlines, Inc., 329 F. 2d 32, 34 (2d Cir.), *cert. denied,* 379 U.S. 817 (1964). *See also* Manning v. American Airlines, Inc., 221 F. Supp. 301 (S.D. N.Y. 1963).

The BLFE argues that the intention of Congress in giving the Award a limited 2-year life was to deny it any further legal effect, to leave the parties as if the award had never been in existence, and to restore the status quo ante with the result that the day after the Award expired the work rules in effect were the same as those in effect when the statute was passed. This approach has a kind of formal logic, and certain provisions of Public Law 88-108 could be read this way. Our approach in ascertaining "legislative intent" is hampered by the fact that the possibility that by the end of the formal duration of the Award the parties might not have agreed on anything to take its place is a subject on which the legislative history is, to use Justice Harlan's phrase, "essentially negative, which shows with fair conclusiveness only that Congress was not squarely faced with the problem this case presents."[16] In our case there is the added consideration that Congress was undoubtedly aware of the problem but apparently thought wisdom lay in avoidance of express delineation.

We think the mere limitation of the effective period of the Award neither implies nor compels the construction the unions seek. Our ruling is that the work rules created by the Award constituted a new plateau that was not automatically eroded when the Award expired. The legal underpinning for our ruling is not the Joint Resolution, which expired after 180 days of life—except insofar as necessary to sanction the Award. The ruling is not based on the Award, which had only a 2-year life, or on any agreement of the parties. The predicate of our ruling is, simply, the force of the Railway Labor Act. Certain work rules were in force on January 24, 1966 (or March 30, 1966, in the case of the BLFE). The mandate of the Railway Labor Act requires that the work rules in effect on any particular day shall also be in effect the following day—beyond the power of either party to institute a unilateral modification—subject to change only in accordance with the procedures prescribed by the Act. These procedures begin with the notices required by Section 6 to be served by any party seeking a change at least thirty

[16] *National Woodwork Mfrs. Ass'n v. NLRB*, — U.S. —, —, 35 U.S.L.W. 4349, 4360 (U.S. April 17, 1967).

days in advance of the proposed effective date of such change. This new-plateau reasoning applies even though the work rules are established by agreements of limited duration. "The effect of §6 is to prolong agreements subject to its provisions regardless of what they say as to termination."[17] It likewise applies even though the work rules are established by an arbitration award of limited duration.

This by no means suggests that there is no legal significance in establishing an award or agreement as one of limited duration. The limited duration has the obvious significance that work rules can be changed for the post-expiration period. The work rules can be changed, however, only by compliance with the provisions of the Railway Labor Act prescribing how changes in work rules are to be effectuated.

What we are in effect holding is that since Public Law 88-108 is silent as to the applicable legal rule, the case is governed by the combination of undeniable physical facts plus the general legal rule of the Railway Labor Act. The BLFE is constrained to find superseding intention in Public Law 88-108 which would in effect obliterate not only the Award as a document with legal effect but also the physical facts that came into being during the 2-year period. We think its construction of Public Law 88-108 would be unreasonable and inconsistent with the purposes and context of the legislation. It must have been reasonably contemplated that the Board of Arbitration might order deflation of the scope of existing overmanning. And it seems obvious that an automatic rescinding of any such pruning at the instant the Award was to terminate would spark the most unsettling havoc. To reach this result would necessarily mean trying to recreate a practically unrecoverable situation and sweeping away a host of rights that had already vested concomitant with the award, made final under the Act, permitting reductions in the work force. Such a view would also wipe out the supposedly permanent guaranty of employment for those thousands of employees whose seniority, the Award decreed, entitled them to lifetime protections.

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[17] Manning v. American Airlines, Inc., *supra* note 15, 329 F. 2d at 34.

III

We turn now to the question to what extent and by what procedure the parties could and did lawfully invoke the machinery prescribed by the Railway Labor Act in order to change the work rules in effect on the railroads at the expiration of the Award, rules that had been prescribed by the Board (including the crew consist rules prescribed by various local boards).

As already stated, these work rules were not immutable. Congress had enacted a compulsory arbitration measure of limited duration. The appropriateness of a limited duration for a compulsory arbitration measure, articulated by the Supreme Court 50 years ago in *Wilson* v. *New*, had been emphasized by the President and Congress.[18]

When were the parties to bargain about possible changes in the work rules that survived the Award? All parties agree that negotiation during the pendency of Award 282 was permissible, but the carriers say it was not obligatory. In our opinion, however, bargaining during the pendency of the Award 282 was not merely a matter for the whim of the parties but was to be governed by provisions of the Railway Labor Act, and these provisions remained in effect during the life of the Award for purposes of regulating the responsibilities of the parties to bargain concerning changes proposed to become effective *after* the expiration of the Award.

The principles and objectives underlying Public Law 88-108 reveal that Congress placed a high premium on the opportunity for continued collective bargaining during the life of the Award, in the hope and expectation, apparently shared at that time by the parties themselves, that the unions and carriers would themselves work out a long range solution to these sensitive problems by the traditional devices of collective bargaining. This special statute served to give the Nation a temporary respite from the threat of a disastrous national rail strike by forbidding for two years any unilateral changes or resort to self-help and imposing instead interim rules to cover the situation. But as we have seen, both the statute and the

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[18] *See* note 10 *supra*.

Award expressly contemplated that the parties were free to alter or extend the rules fixed by Award.[19]

Public Law 88-108 established a procedure for formulating rules to govern for up to two years, in the absence of a negotiated pact. This did not displace the otherwise applicable provisions of the Railway Labor Act on the duty to bargain on changes proposed to become effective subsequent to the two-year period. President Kennedy in his message to Congress expressed the desire that the parties continue to confer on the ultimate resolution of their disputes.[20] A chief spokesman for the carriers, Mr. J. E. Wolfe,[21] assured the Senate Committee that the carriers understood that the Administration's bill "imposes a duty on the parties to attempt to settle their differences" and would "protect the public interest as a result of the establishment of these interim rules for a period of 2 years or less while the parties undertake, through collective bargaining, to bring about a more permanent solution of the problems."[22] We are aware that in the reshaping of the measure the duty to bargain on the work rules was not expressly spelled out, but the plan was surely retained. Indeed the preambles of both measures expressly and unequivocally proclaimed the care taken to select a system which solved the immediate emergency "in a manner which preserves and prefers solutions reached through collective bargaining." Changes were made by the Congress—notably the substitution of an independent *ad hoc* board for the Interstate Commerce Commission as the arbiter for the dispute.[23] There was not a breath of a suggestion, however, that Congress intended to remove

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[19] Indeed, on the crew consist issue, Section III.A(1) of the Award remanded the dispute to local properties "for negotiation", and only if these further efforts to reach a settlement proved pointless, were special boards of adjustment to be convened to fix the temporary rules.

[20] *See Message from the President, supra* note 7, at 6-8.

[21] Chairman of the National Railway Labor Conference, an organization whose members conduct about ninety percent of all railway operations in the United States.

[22] *Hearings on S.J.Res. 102, Before the Senate Comm. on Commerce,* 88th Cong., 1st Sess., ser. 24, at 375 (1963).

[23] The Supreme Court referred to this substitution as the only "significant change" from the Administration bill. Brotherhood of Locomotive Engineers v. Chicago, Rock I. & Pac. R.R., *supra* note 4, 382 U.S. at 432.

or even downgrade the policy that the parties themselves should confer in order to reach long-range solutions through collective bargaining and agreement.

The carriers contend that all this means only that the parties were free to bargain during the Award if they wished, or even that they were encouraged to do so, but that for the two-year period the special act repealed pro tanto and by implication the duty under the Railway Labor Act to confer on proposed rule changes. We disagree. In our view Public Law 88-108 was intended to work the minimum disruption of permanent railroad legislation and normal collective bargaining. The only disruption wrought, the only "repeal by implication", was that which necessarily accompanied the objective of staving off a cataclysmic strike by imposing a temporary settlement. We detect no glimmer of an intimation that the carriers were authorized to regard this as a two year hiatus in their obligation to bargain. Rather, we find much to militate against such a construction.

It is notable that the parties to this dispute had already agreed to submit their controversy to arbitration. They stumbled over procedural details. Congress viewed its role primarily as draftsmen of the specifics of an arbitration agreement to which the carriers and unions had already agreed in principle.[24] The statute in Section 4, the Award in Part IV, and the reports of both congressional committees carefully specified that the effective duration of the Award was limited to no more than two years, unless extended by stipulation, in order to restrict the "scope and impact" of the statute.[25]

In essence then we have a mechanism tantamount to an arbitration agreement, albeit one drafted by Congress, that confers on the arbitrator the power to impose a settlement binding for up to two years. It becomes appropriate, then, to consider what would have been the rights and duties of the parties if they had themselves written

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[24] *See* S. Rep. No. 459, 88th Cong., 1st Sess. 9 (1963); H.R. Rep. No. 713, 88th Cong., 1st Sess. 12-13 (1963); Brotherhood of Locomotive Firemen v. Chicago, B. & Q. R.R., 225 F. Supp. 11, 18 (D.D.C.), *aff'd*, 118 U.S.App.D.C. 100, 331 F. 2d 1020, *cert. denied*, 377 U.S. 918 (1964).

[25] S. Rep. No. 459, 88th Cong., 1st Sess. 10 (1963); *see* H.R. Rep. No. 713, 88th Cong., 1st Sess. 14-15 (1963).

the arbitration agreement. We are not concerned here with customary adjudicatory or grievance arbitration. Although so-called "legislative" arbitration agreements are relatively infrequent they are not unknown. Under such agreements, prospective rules and working conditions, instead of being determined by agreement of the union and employer, as is customary, are determined by an arbitrator to whom the function is delegated.[26] Such a determination by arbitration is equivalent to a determination by agreement insofar as the rights and duties of the parties concerning future modification are concerned. An arbitration award does not operate to "prevent the [parties] from seeking through negotiations under the procedures provided for by the Railway Labor Act or otherwise a new agreement . . . covering the rules. . . ."[27]

Responsible conduct of the process of collective bargaining, for consideration of proposals to modify work rules established by an agreement or award of limited duration, embraces conference and consultation prior to the termination date. This is the way responsible businessmen deal with each other when they plan to continue a business relationship—for example, in negotiating on a contract or lease before its expiration date. This is the way responsible employers and unions implement the collective bargaining process, and respond to calls for change. And this is the way railroads and railroad unions must respond under the mandate of the Railway Labor Act.

The purpose of a Section 6 notice is "to fix a procedure for the commencement of conferences between representatives of the two parties if changes are to be made in the contract."[28] No rigid form for these notices is defined in the statute.[29] All that is specified is thirty days written notice of a proposed change. The Act requires that within ten days a time and place for conference be

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[26] *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 30-47 (rev. ed. 1960).

[27] Sheehy, Ch.J., in Brotherhood of Railroad Trainmen v. St. Louis Sw. Ry., 220 F. Supp. 319, 326 (E.D. Tex. 1963).

[28] McMullans v. Kansas, O. & G. Ry., 229 F. 2d 50, 56 (10th Cir.), *cert. denied*, 351 U.S. 918 (1956).

[29] *See* Detroit & T.S.L.R.R. v. Brotherhood of Locomotive Firemen, 357 F. 2d 152, 153 (6th Cir. 1966).

set, and that the first conference be held within the 30-day period.

To recapitulate, the Railway Labor Act not only requires railway employers and unions to confer and bargain on work rules established by agreements or awards having a fixed expiration date when one party wants to change the rules, but permits the statutory machinery to be invoked *prior* to expiration in order to seek an agreement on changes to become effective on or after expiration.

If an agreement (or award) contains a fixed expiration date, rather than the common indefinite or automatic self-renewal term, then the notice must indicate a proposed effective date for changes that is not only at least thirty days after the notice, but also a time after the outstanding agreement or award expires. Nothing in the Railway Labor Act, or the scheme of Public Law 88-108, forbids service of a notice more than thirty days before suggested rules would or could be effective, and nothing relieves the recipient from the duty to commence bargaining at that earlier stage.

The carriers seek to buttress their claim of pro tanto repeal by implication by arguing that it can hardly be supposed that Congress intended to permit the unions to ready themselves to strike on January 25, 1966. The only forecast of that day we can find in the legislative history is the assumption that it would be preceded by an agreement of the parties. And that in turn, in our view, assumes that responsible collective bargaining would have been in train some time prior to the expiration date. If we turn from speculation about legislative intent to the realities of the Railway Labor Act, we are aware that the conferences triggered by Section 6 notices are typically the beginning and not the end of the statutory procedures. If conferences proposed by a Section 6 notice are unavailing, either party can invoke the services of the National Mediation Board. While negotiations continue or the Board has jurisdiction, no self-help is permitted. The parties are free to submit their controversy to arbitration. If none of these techniques resolves the matter, the President may convene an emergency board to investigate the dispute and report back on the issues. Only when all these steps have been exhausted are the parties permitted

to act unilaterally. "For the procedures of the Act are purposefully long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute."[30]

We do not say that the time of service of notice is completely irrelevant to the duties of the parties. It may be that a notice served the day after the Award would betoken bad faith to the point of vitiating its validity. We shall have occasion to point out that certain union notices were defective for analogous reasons. But the mere fact that the union notices were served prior to January 25, 1966, did not relieve the carriers of their duty to confer and bargain prior to January 25, 1966. We are not considering a case where the railroads, while conceding that the unions had a right to begin bargaining prior to the expiration date, responded that the particular notice came too early, perhaps on the ground that it did not permit enough experience under the existing rules to spawn realistic and informed bargaining. In the case before us the carriers flatly refused to engage in any statutory bargaining whatever prior to the expiration date. Except in the case of objectionable union proposals discussed below, the carriers before us must be held to have breached their statutory duty under the Railway Labor Act to confer and bargain on the merits of proposed changes in work rules. The decree of the District Court embodies a contrary declaration, and to that extent it is reversed.

We now consider the effect of our reversal of the District Court's ruling that the notices were not effective to require negotiation until after termination of the Award. As we have seen, conferences are but the first step in the chain of Railway Labor Act procedures. Once they have been frustrated, one side to the dispute can move to the next tier of procedures, and indeed in at least one series of cases involving parties before us the National Mediation Board has accepted jurisdiction of the controversy. The carriers have forsaken their right to insist on conferences by their refusal to respect effective Section 6 notices. The standard for good faith bargaining is quite

[30] Brotherhood of Railway Clerks v. Florida E.C. Ry., 384 U.S. 238, 246 (1966). See also Farmer, *Compulsory Arbitration—A Management Lawyer's View*, 51 VA. L. REV. 396, 401-02 (1965).

liberal. Certainly it does not compel agreement. Judge Bryan, after the most careful analysis, formulated the frequently quoted standard that the—

> requirement of good faith bargaining is really a requirement of absence of bad faith. In order to show such lack of good faith it is necessary to establish facts from which it can be reasonably inferred that a party enters upon a course of bargaining and pursues it with the desire or intent not to enter into an agreement at all. *American Airlines, Inc.* v. *Air Line Pilots Ass'n*, 169 F.Supp. 777, 794 (S.D.N.Y. 1958).

Applying such a test, the carriers have breached their duty to enter negotiations in good faith, for a refusal to bargain on an erroneous premise of law is no excuse.[31]

IV

Although the statutory duty to bargain continued during the limited duration award, it was not unaffected by the temporary statute and the arbitration award. Their emanations do affect the conceptions of bargaining in good faith, pursuant to a good faith notice, inherent in the scheme of the Railway Labor Act. We shall develop our specific rulings by considering the three groups of unions in chronological order by dates of notices.

A. Order of Railway Conductors and Brakemen (ORCB)

One group of cases before us, Nos. 20158 and 20191, concerns the Order of Railway Conductors and Brakemen (ORCB).[32] On Monday March 23, 1965, that union, expressly relying on the provisions of the Railway Labor Act, served notices on the carriers which proposed a rule requiring not less than one conductor and two brakemen on all classes of road train service thirty days after

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[31] *See, e.g.*, Order of Railroad Telegraphers v. Chicago & Nw. Ry., 362 U.S. 330 (1960). We do not consider attempts to obtain new work rules incompatible with those imposed by the Award or with the report of the Presidential Emergency Board reflective of bad faith on the part of the unions. Compare Pullman Co. v. Order of Railway Conductors, 316 F. 2d 556 (7th Cir.), *cert. denied*, 375 U.S. 820 (1963).

[32] The District Opinion is reported: Akron & B. Belt R.R. v. Order of Railway Conductors, 253 F. Supp. 538 (D.D.C. 1966).

notice. That date was, obviously, a full nine months prior to the expiration date of the Award. The carriers considered the notices premature and refused to concede any obligation to bargain on the merits of the proposals.[33] ORCB invoked the services of the National Mediation Board, which docketed the case, but suspended action when the District Court held the notices premature.

We think it manifest that the proposal to scrap the Award during its lifetime could be broached to the carriers to see if they were interested but could not be presented to them as a subject of bargaining that was mandatory under a statutory obligation. We agree with Judge Bryan's approach that the collective bargaining system of the Railway Labor Act subsumes and presupposes a bargaining "in good faith."[34] The issue of good faith is interlaced with "bargainability"—a term of art which means not only capable of being bargained but also a proper subject of mandatory bargaining. We have already held that the carriers were in bad faith in asserting that they had no legal obligation to bargain during the life of the Award. They had an obligation, we think, to bargain about changes to become effective with the expiration of the Award. But we also think that they had no obligation to bargain about a proposal to make changes during the life of the Award. Such an obligation would be inconsistent with an inherent and essential element of Public Law 88-108, which was intended to promote long range solutions through collective bargaining by removing the need to bargain over immediate crises.

The ORCB argues that the carrier's duty to bargain is reaffirmed by Section III of the award of Board 282 which directs the parties to resume local negotiations on crew consist. We agree that the unions could have called on the carriers to negotiate pursuant to the Award. But this is entirely different from the statutory duty imposed by Section 6 of the Railway Labor Act, upon which the union

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[33] The carriers lodged a further objection on the ground that the ORCB is not the certified bargaining representative of most of the road brakemen directly affected by the notices. Compare Southern Pac. Co. v. Switchmen's Union of North America, 356 F. 2d 332, 335 (9th Cir. 1965). The parties have stipulated this issue out of these proceedings.

[34] *See* American Airlines Inc. v. Air Line Pilots Ass'n, *supra*, 169 F. Supp. at 793-95.

purported to rely. The Award machinery was essentially different from and displaced the Railway Labor Act concerning rules effective during the life of the Award. This is demonstrable from the provision of the Award that specified that if the parties were unable to arrive at an agreement their dispute should be referred to a local arbitration tribunal. This is, of course, entirely different from and supersedes the basic structure of the Railway Labor Act which provides for compulsory arbitration only for minor disputes, and contemplates mediation or voluntary arbitration where agreement has not settled "major disputes," i.e. disputes relating to changes in rates of pay, rules or working conditions.[35] In this context, we agree that these notices were premature.

B. Brotherhood of Railroad Trainmen (BRT)

In another group of cases (Nos. 20152, 20172, 20229 and 20249) we are concerned with the Brotherhood of Railroad Trainmen (BRT).[36]

On June 30, 1965, BRT served a notice proposing that beginning January 26, 1966 (unquestionably after the termination of the Award) a new work rule be inserted in the agreements between the BRT and the carriers requiring that not less than two, or in some cases three, brakemen be included in the "crew consist" of the carrier's runs. In most instances the carriers in turn served counter-proposals with respect to crew consist rules, although they took the formal position that the BRT notices were premature and that during the life of the Award the only proper procedure for instigating crew consist changes was in accordance with Part A(3) of Section III of Award 282.[37]

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[35] *See* Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 722-28 (1945).

[36] These are appeals from judgments following the opinions in Akron & B. Belt R.R. v. Brotherhood Railroad Trainmen, 250 F. Supp. 691, 252 F. Supp. 207, and 254 F. Supp. 306 (D.D.C. 1966).

The Switchmen's Union of North America (SUNA) is also a party in Appeals 20152 and 20172.

[37] "Either party in interest shall give written notice of any proposed change in any such stipulated number of trainmen. . . . The time and place for the beginning of conferences between the representatives of the parties in interest with respect to such proposed change or changes shall be agreed upon within 10 days after the receipt of said notice, and said time shall be within 15 days after the receipt of said notice."

The carriers' denial of an obligation to bargain with the BRT was essentially based on the contention of prematurity which we have already considered and rejected.

We turn to the carriers' current argument that Section 6 of the Railway Labor Act cannot meaningfully impose a duty to bargain during the life of the Award about changes following its expiration, since this would undercut bargaining pursuant to the Award concerning work rules during the life of the Award. We see no inherent inconsistency such as we found in discussion of the ORCB proposals. Bargaining and arbitration for rules to be in effect for a two-year period are not inherently negatived by tandem bargaining under a different system over long-range rules. Conflict in scheduling might be a temporary problem, but it could hardly dignify a complete denial of a duty to bargain over the ultimate and dominant issues.

C. Brotherhood of Locomotive Firemen and Enginemen (BLFE)

The third major group of cases, Nos. 20192, 20193, 20215 and 20216, involves the Brotherhood of Locomotive Firemen and Enginemen (BLFE).[38]

In November 1965 this union served notices to take effect at 12:01 a.m. on March 31, 1966, the day after the Award, as extended by stipulation, was to expire. There were three notices, each made expressly pursuant to the Railway Labor Act. Notice No. 1 related to the types of engine services on which the employment of firemen would be required, and would have pegged employment at a level of 6000 jobs below the terms of the National Diesel Agreement, but far above the level provided by Award 282. Notice No. 2 provided for compensation to firemen who had been relocated, severed, or otherwise disadvantaged by the operation of Award 282. By stipulation of the parties we need not here consider Notice No. 3, which set out a training program for apprentices. The carriers contended that all such notices were premature, and further contended that the second and third were not even proper subjects of collective bargaining. Several

[38] These are appeals from judgments following the opinion in Bangor & A.R.R. v. Brotherhood of Locomotive Firemen, 253 F. Supp. 682 (D.D.C. 1966).

abortive conferences were held, but the carriers resisted any attempts to reach the merits of the proposed rules.

In the BLFE consolidated declaratory judgment actions, the District Court agreed with the carriers on the major points, holding Notices 1 and 2 not only premature but also *non-bargainable* although the carriers had not even challenged the bargainability of the first notice. The court's interjection seems not only to have provided an additional reason for holding that the carriers had not violated a legal obligation in the past, but also to have prompted the carriers to seek restriction of their obligation to bargain in the future.

With the controversy thus expanded when there was already uncertainty as to the exact legal rights of the parties, the issue became the subject of a legal ruling. Since the genie can not be put back into the bottle, we turn to consideration of the soundness of the determination by the District Court, and we conclude that it was not a correct statement of applicable legal doctrine.

The District Court reasoned that—

> the employees may not in the guise of serving notices under Section 6 of the Railway Labor Act, seek to abrogate or set aside the Award. It must be borne in mind that the Award is the result of a compulsory arbitration conducted under a mandate of Congress and has the stamp of judicial approval in the form of a judgment in a proceeding to impeach it. Neither a carrier, nor a union may institute proceedings, directly or indirectly, to set aside any provision of the Award, or the operations or activities that have taken place under it or the results that have been achieved.[39]

Since these notices were found not to "relate to matters subject to collective bargaining under the statute," the court declared that they "need not be complied with." 253 F.Supp. at 689. We disagree and are of the view that Congress did not intend that either Public Law 88-108 or Award 282 would permanently excise from the scope of

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[39] Bangor & A.R.R. v. Brotherhood of Locomotive Firemen, *supra* note 38, 253 F. Supp. at 687.

collective bargaining any proposals that otherwise would have been lawful under the Railway Labor Act. Applying this standard, we find that Notice No. 1 falls within the realm of proper collective bargaining, but Notice No. 2 does not.

We begin our reasons for reaching this conclusion with a review of the principles surrounding disputes about bargainability. The settled tradition under the Railway Labor Act reveals a firm obligation on the railroads and their employees to negotiate about changes in working conditions suggested by one side or the other. In the landmark case of *Virginian Ry.* v. *System Federation No. 40, Railway Employees Dep't*, 300 U.S. 515, 548 (1937),[40] Justice Stone held that while the Act does not compel agreement, it does demand those preliminary steps, triggered by a Section 6 notice, without which no agreement could be reached. The minimum requirements are that the employer at least meet with the union to listen to its proposals and to make a reasonable effort to achieve an accord.

The subjects for mandatory mutual consideration are defined in Section 6 merely by reference to "rates of pay, rules, or working conditions."[41] But the courts have ratified the practice of the industry so that the duty to bargain "generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States."[42] That is, "what carriers must legally bargain about is affected by what is in fact bargained about in the railroad world."[43]

The scope of bargainability is extremely broad. The recent guidepost opinion in *Order of Railroad Telegraphers* v. *Chicago & Nw. Ry.*, *supra* note 31, 362 U.S. at 338 (1960) states:

> In an effort to prevent a disruption and stoppage of interstate commerce, the trend of legislation affecting

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[40] *Accord*, Elgin, J. & E. Ry. v. Burley, *supra* note 35, 325 U.S. at 724-25 (1945).

[41] *See also* 45 U.S.C. § 152, Seventh (1964).

[42] Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 346 (1944).

[43] United Indus. Workers of Seafarers Int'l Union v. Board of Trustees of Galveston Wharves, 351 F. 2d 183, 191 (5th Cir. 1965).

railroads and railroad employees has been to broaden, not narrow, the scope of subjects about which workers and railroads may or must negotiate and bargain collectively. Furthermore, the whole idea of what is bargainable has been greatly affected by the practices and customs of the railroads and their employees themselves. It is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees as well as the interests of the railroad and the public at large.[44]

The court upheld the right to strike to compel bargaining on a proposed work rule change to prevent the carrier from abolishing positions in existence before a certain date. The court rejected the carrier's contention that the proposal was not part of a legitimate "labor dispute" because it sought to perpetuate "wasteful" and "unnecessary" jobs.

The scope of "work rules" discussed by railroads and unions over the past century, including the use of firemen and the manning of trains,[45] has greatly exceeded what a layman might expect the term to include. Bargaining in the rail industry has comprehended fields frequently reserved to management in other industrial contexts. Not until the railroads began to experience the pressure of advancing technology and vigorous competition from other modes of transportation after the Second World War was there any suggestion that some questions of mutual interest might be beyond the pale of required bargaining. Increasingly, the roads have come to use the allegation of non-bargainability, and have sought judicial rulings to protect managerial discretion.[46] Rarely have

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[44] *Cf.* Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 209-15 (1964).

[45] *See* H.R. Rep. No. 713, 88th Cong., 1st Sess. 6 (1963); Comment, *The Railway Work Rules Dispute—A Precedent for Compulsory Arbitration,* 14 DE PAUL L. REV. 115, 119-20 (1964). *See also* Brotherhood of Locomotive Engineers v. Chicago, Rock I. & Pac. R.R., *supra* note 4, 382 U.S. at 429.

[46] See the excellent discussion in Weber, *Public Policy and the Scope of Collective Bargaining,* 13 LAB. L.J. 49 (1962).

the courts sanctioned this technique, and recent pronouncements do not augur well for its encouragement.

This setting bids us be chary of the conclusion of the District Court that there was no bargainability in Notice No. 1 which proposed that for the future the parties establish work rules different from those prescribed by the Award for a two-year period. The court stated that Notice No. 1 "demands the restoration of firemen on those runs for which Award 282 expressly held firemen were unnecessary. Obviously, compliance with this notice would be a consent to abrogate and do away with the outcome of the arbitration." [47] The District Court gave no clue as to how in its opinion a Section 6 notice could validly propose changes in the work rules established by the Award, by what method, and to what extent.

In our view its conclusion was erroneous. The crisis conditions of 1963 evoked an unusual response from Congress, but one not intended to displace totally the framework of labor relations law and practice in the field. The phrasing of Public Law 88-108 and the reports that accompanied it make clear that Congress in its controlled response did not intend to effect a permanent alteration in development of collective bargaining. The preamble set the tone of the statute, declaring that "it is desirable to achieve [the protection of the national interest] in a manner which preserves and prefers solutions reached through collective bargaining. . . ." According to Section 8, the statute expired of its own terms one-hundred and eighty days after enactment. The Award of the Arbitration Board, by virtue of Section 4, could not "exceed two years from the date the award takes effect, unless the parties agree otherwise." Section IV of the Award itself reiterated the limited duration of the terms imposed and specified it would be in force for two years "unless the parties agree otherwise."

This dual theme of limited survival and contractual freedom infuses a proper resolution of this case, and does so with a spirit that is frustrated by the District Court's conclusions of non-bargainability (and indeed of

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[47] Bangor & A.R.R. v. Brotherhood of Locomotive Firemen, *supra* note 38, 253 F. Supp. at 688.

prematurity). In providing in Section 3 of the law that the Award would be "binding on both the carrier and organization parties" and constitute a "complete and final disposition" of the major issues, Congress meant only that the Board's conclusions were to have the status of arbitration awards in the classic sense, not merely of mediation suggestions or fact-finding as in the ordinary major dispute under the Railway Labor Act. But Congress contemplated and intended that the parties could continue to work out a settlement different from that imposed by the Board to be effective for a limited two-year period. In submitting the Administration draft to Congress, "President Kennedy repeatedly emphasized to the Congress his hope that the dispute could eventually be settled by collective bargaining." *Brotherhood of Locomotive Engineers* v. *Chicago, Rock I. & Pac. R.R., supra* note 4, 382 U.S. at 431. The President "expressed no desire to have Congress pass a law that would finally and completely dispose of the problem," observing that it would be "'wholly inappropriate to make general and permanent changes in our labor relations statutes. . . .'" *Id.* at 432. And the Congress "enacted the bill proposed by the President" with but "one significant change" not relevant here. *Ibid.*

Congress emphasized in unambiguous terms that the parties were not to be locked in by the terms of the Award on the firemen and crew consist issues:

> It should be especially noted that, although the joint resolution provides for arbitration on these two issues, the parties may still bargain collectively on these issues, and resolve them among themselves. This process may take place before the arbitration board is established; after the board has initiated its proceedings; and may also take place after the board has made an award. By agreement, the parties may make the appointment of the board unnecessary; may make the decision of the board unnecessary; *and may supersede the decision of the board—all through collective bargaining.* H.R. Rep. No. 713, 88th Cong., 1st Sess. 13 (1963). (Emphasis added.)

We find it impossible to accommodate the operative language and animating philosophy of Public Law 88-108 with the District Court's holding that Notice No. 1 was non-bargainable. The carriers argue now that the District Court did not foreclose all possibility of altering the rules imposed by the Board, but meant only to vindicate its efforts by precluding return to the status quo ante. Even if we agreed that the BLFE's Notice No. 1 would have that effect,[48] nothing we detect forbids proposing just such a complete regression. At least, we hold that under the Railway Labor Act, and after taking into account such qualification of that law as is fairly implied from Public Law 88-108, the BLFE could legitimately require that the carriers negotiate about these proposals for work rules to be operative in the future.

Nothing compels the carriers to accede totally to changes proposed in Notice No. 1, and indeed in light of the realities of collective bargaining it is unlikely that the BLFE expects to insist on complete acceptance of its suggestions. But certainly there was no disability prohibiting the opener that the BLFE included in its first notice.

Notice No. 2, however, falls in a different category. It did not propose certain rule changes to govern the future operation of the railroads. It was aimed directly and undeniably at vitiating the Award of the Arbitration Board, an Award that has long since received judicial confirmance and been fully implemented by the parties. Although Notice No. 2 expressly refers to Section 6 of the Railway Labor Act, the notice on its face demonstrates the irrelevance of Section 6, and the "major disputes" provisions of the Railway Labor Act in general.

Notice No. 2 explicitly proposed that "employees whose employment and seniority were terminated by the application or misapplication of the Award of Arbitration Board 282 will, on [the expiration of the Award as extended by stipulation], be recalled and restored to the seniority roster and employed with their original seniority date and used as firemen (helpers)...." In subsequent sections,

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[48] We note, however, that apparently 6000 fewer firemen would have been required under the proposed rules than the National Diesel Agreement had provided.

the notice proposed that employees terminated in the course of implementing Award 282 be reimbursed for monetary loss due to the termination and deprivation of seniority, including expenses incurred for meals, travel, lodging, and change of residence when relocating for other assignments.

These proposals relate to alleged past grievances. We are concerned here with bargainability, and instinct in the essence of collective bargaining is a notion of mutuality, that if a subject is brought up each side has at least the authority both to offer and to concede.

What is the status of the union concerning the subject it proposed for bargaining in Notice No. 21. We turn to *Elgin, J. & E. Ry.* v. *Burley, supra* note 35, 325 U.S. at 739:

> To settle for the future alone, without reference to or effect upon the past, is in fact to bargain collectively, that is, to make a collective agreement. That authority is conferred independently of the power to deal with grievances, as part of the power to contract "concerning rates of pay, rules, or working conditions." It includes the power to make a new agreement settling for the future a dispute concerning the coverage or meaning of a preexisting collective agreement. For the collective bargaining power is not exhausted by being once exercised; it covers changing the terms of an existing agreement as well as making one in the first place.
>
> But it does not cover changing them with retroactive effects upon accrued rights or claims. For it is precisely the difference between making settlements effective only for the future and making them effective retroactively to conclude rights claimed as having already accrued which marks the statutory boundary between collective bargaining and the settlement of grievances.

The Court held that a union had no lawful authority to bargain for some of its members in settling claims they asserted against the railroad arising from the application of new work rules. The court observed that the railroad

was not entitled to assume from the union's status as bargaining agent that it had the right to settle claims for past grievances, and that any agreements reached were without legal significance.

This analysis has an immediate bearing on our situation. The BLFE proposed that the carriers jettison the rights that had accrued to them under the Award, for the Notice by its terms is limited to rehiring and reimbursing those employees terminated in implementing Award 282. If Award 282 meant anything it provided the sanction of Congress for the railroads' authority to discharge thousands of firemen. This permission was sharply narrowed by stringent protective provisions under which severed employees have already received many millions of dollars in benefits. The rights to these payments vested when the employees were discharged pursuant to the Award. The BLFE Notice proposed that the carriers renounce their vested rights. But the bargainability of this subject matter as a proposal for a change in "work rules" is undercut by the fact that the *Elgin* case squarely denies the BLFE any warrant in law to "bargain" over any possible concession on the employee's side to make a refund, or even partial refund, of any severance benefits already vested or paid. Clearly a proposal that cannot lawfully be adopted is non-bargainable.[49] Since the union could not bargain away any part of the rights that accrued to employees under the Award, it could not compel the railroads to bargain on a proposal that they surrender rights that accrued to the carriers under the Award, which defined and limited the liability of the carriers arising from changes made in accordance with the Award.

In Notice No. 2 the union claimed there had been misapplication of the award. As to this it suffices to point out that Section 8 of the Railway Labor Act[50] and Section 4 of Public Law 88-108 permit the union to bring forward, questions of interpretation as to the scope and applicability of the Award for resolution by Board 282.[51] But

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[49] *See* Southern Pac. Co. v. Switchmen's Union of North America, *supra* note 33, 356 F. 2d at 334-35.

[50] 45 U.S.C. § 158(m) (1964).

[51] *See* Brotherhood of Railroad Trainmen v. Terminal R.R. Ass'n, — U.S.App.D.C. —, — F. 2d — (No. 20135), decided this day.

these would not be comprehended by Section 6 of the Railway Labor Act, governing proposed changes in work rules, classified as major disputes.[52] The rest of Notice No. 2 is inherently an attack on the fairness of the Award —and that is not bargainable under Section 6 consistently with the purpose of Public Law 88-108, and the Award thereunder and its judicial confirmance.

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It is our hope and contemplation that any further litigation will be conducted with a fresh outlook. The halls of justice should not be an arena where gladiators are spurred on in desperate combat. They provide a forum where legal disputes can be settled, with a minimum of rancor, so as to further the Congressional objective of agreement and, if possible, harmony between carriers and unions.[53]

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[52] The BLFE contends in its brief that there is nothing wrong with retroactive contract proposals and agreements, and suggests that they are used frequently in industrial relations. Whatever may be the general practice, and regardless of what other provisions of the Railway Labor Act may require, there is no duty to bargain collectively over the settlement of past grievances that is imposed by Section 6.

[53] This court's opinions in the instant cases will undoubtedly have bearing on others arising in one way or other out of Award 282.

Before the present division are ten cases, Nos. 20152, 20158, 20172, 20191, 20192, 20193, 20215, 20216, 20229 and 20249.

Before the instant division also is No. 20316, decided today.

Previously argued before Judges Bastian, Burger and Wright are five cases, Nos. 19867, 20003, 20004, 20212 and 20213.

Case No. 20135, decided today, came before Chief Judge Bazelon, Senior Circuit Judge Edgerton and Circuit Judge Coffin, (of the First Circuit sitting by designation).

Hitherto in the District Court, cases involving the railway work rules disputes have been referred to a single District Judge. The fact that we have differed from him in some aspects of relief granted or of the basis of rulings should not be permitted to obscure our appreciation for the prodigious effort he has made in response to so difficult an assignment, and for the commendable manner in which he has approached so many novel and complex questions.

In today's text we have undertaken definition of the basic legal principles applicable to future consideration of the issues. It would seem that sound judicial administration of the District Court's business will be served by rotation of this assignment at this juncture. We have in mind avoidance of further burdening of this District Judge and the broadening of appli-

The parties are directed to submit within 10 days a proposed judgment, and to confer and endeavor to agree thereon. At that time the parties may also request supplemental rulings on any matters that have not been discussed in this opinion.

*Affirmed in part, reversed in part.**

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cation of pertinent judicial expertise and exposure in meeting our common problems in this area. So it is that we have ourselves achieved some distribution of the workload, and we regretfully assume that there may yet be heavy demands on judicial manpower in the District Court by reason of railroad work rules controversies.

* Appendix omitted.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 20,152, 20,158, 20,172, 20,191, 20,192, 20,193, 20,215, 20,216, 20,229, 20,249

Appeals from the United States District Court for the District of Columbia

Mr. Milton Kramer was on the brief for appellants in Nos. 20,152, 20,229 and 20,249 and appellees in No. 20,172.

Mr. James D. Hill for appellant in No. 20,158 and appellee in No. 20,191.

Mr. Joseph L. Rauh, Jr., with whom *Messrs. John Silard, Daniel H. Pollitt, Isaac N. Groner, David Epstein* and *Stephen E. Moss,* were on the brief for appellant in Nos. 20,192 and 20,193 and appellee in Nos. 20,215 and 20,216.

Mr. Francis M. Shea, with whom *Mr. Richard T. Conway* was on the brief for appellants in Nos. 20,172, 20,191, 20,215 and 20,216 and appellees in Nos. 20,152, 20,158, 20,192, 20,193, 20,229 and 20,249. *Messrs. David Booth Beers* and *Ralph J. Moore, Jr.*, also entered appearances for appellants in Nos. 20,215 and 20,216.

Before DANAHER, *Circuit Judge,* BASTIAN, *Senior Circuit Judge,* and LEVENTHAL, *Circuit Judge.*

SUPPLEMENTAL OPINION

[Filed July 31, 1967]

LEVENTHAL, *Circuit Judge:* On May 12, 1967, this court released its opinion disposing of many of the legal questions arising from the railway work rules disputes and the compulsory arbitration statute passed by Congress in 1963 to handle the controversies. Because of the number and complexity of the issues, we directed the parties to confer in an effort to propose a judgment embodying our rulings, and invited them to request supplemental rulings on any points not explicitly covered by our opinion.

The parties have submitted numerous requests for supplemental rulings, for reconsideration, and for clarification.

I *The New Plateau Work Rules Continuing in Effect*

A. Brotherhood of Railroad Trainmen (BRT)

The carriers contend that our "new plateau" rationale, holding that the substantive terms effected by Award 282 continue in force after the formal expiration date of the Award until changed pursuant to the Railway Labor Act, logically requires reversal of the District Court's ruling that the procedures established by Award 282 for special arbitration awards on the trainmen issue lapsed at the termination of the Award. We disagree.

Our decision rests on an accommodation of the sometimes divergent directives of Public Law 88-108, Award 282, and the Railway Labor Act. Throughout, our touchstone has been our understanding of dominant Congressional intention. We viewed Congressional intervention in 1963 as reflecting a sensitivity to the dangers of imposing drastic changes on the pattern of railway labor collective bargaining.

The point is simply this: We think Congress meant that changes in substantive work rules issuing forth after the expiration of Award 282 should not be wrought by the compulsory edict of a board, but should either be reached by agreement of the parties or should be born out of their actions under the Railway Labor Act, an act which regulates their conduct of bargaining so as to promote the possibility of agreement, with the assistance of the National Mediation Board or other special boards.

This dominant Congressional intention means that a difference must be drawn between those actions of Board 282 and its agents prior to the expiration date of Award 282 which effected changes in substantive work rules, and those actions which merely constituted issuance of procedures for promulgating future changes in substantive work rules. The completed changes in substantive work rules continue on—unless and until changed again in accordance with the Railway Labor Act. But there is no continuance of what are in effect only procedures for issuing future changes in substantive work rules.

Those procedures constituted a special mechanism for making changes by award, and were intended to have only

a two-year life. Upon the expiration of the two-year period the special machinery was exhausted and in the absence of agreement only the system of the Railway Labor Act was available for future changes in substantive work rules. Consequently, in the absence of ratification by agreement of the parties, a local adjustment board had no independent legal authority that would permit it to achieve an alteration in substantive work rules subsequent to the expiration of the two-year period.

B. Brotherhood of Locomotive Firemen and Enginemen (BLFE)

The parties are in disagreement as to the import for the Firemen of our ruling as to the Trainmen, a ruling announced in our May 12 opinion and adhered to on reconsideration for the reasons noted above.

On the firemen issue, Board 282 decided that most firemen could be dispensed with for other than steam power engines. It developed a procedure permitting the "blanking" of firemen positions as follows: Each carrier could list those engine crews on which it thought firemen unnecessary for reasons of safety or workload. These positions could then be blanked, except that each local union chairman was given the right within 30 days of receipt of the carrier's list to designate up to ten percent of these crews as requiring continued employment of firemen. The Award refers to this right to designation as based upon considerations of safety, undue work burden and adequate and safe service to the public, but provided that the designation shall not be subject to challenge or review. This procedure was designed to take place at three month intervals.

A dispute arose when it came time to decide what happened to this procedure, and the results it had reaped, when Award 282 expired.

The carriers insisted that when Award 282 expired the procedures continued in effect as part of the new plateau of work rules, and constituted a continuing mechanism for reducing the employment of firemen unless and until changed in accordance with Section 6 of the Railway Labor Act. The BLFE argued both that this procedure passed out of existence when the Award terminated, and that the

changes it had effected lapsed, so that positions blanked during the life of the Award were resurrected. The District Court ruled that a "new plateau" had been created that preserved what had been accomplished by the carriers under the Award in reducing firemen's positions, but held that the carriers could no longer resort to the machinery created by the Award to make further job cuts. The District Court concluded, however, that the carriers were prevented only from taking "affirmative acts" in reliance on the Award, but explained that this did not prevent the carriers from refusing to fill vacancies resulting from natural attrition. The underlying premise of that court's decision was that Award 282 superseded the requirements of the National Diesel Agreement which would otherwise demand the use of firemen on all locomotives.

As set forth in our May 12 opinion, this court has rejected, though for somewhat different reasons, the contention of the BLFE that after March 30, 1966, the *status quo ante* compulsory arbitration was automatically restored. While we explicitly ruled that the procedure created by the Board for making new crew consist rules expired when the Award did, we did not previously examine the problem presented in the firemen context.

The BLFE insists that there is no tenable distinction whereby firemen should be subject to continuing reductions under the Award though trainmen are not similarly affected. The carriers concede that it is difficult to distinguish the two situations, but suggest that the Award might be viewed as merely setting forth a procedure for crew consist changes but as directly affecting the firemen rules.

Once again we find both parties somewhat out of alignment with our basic premises. We have endeavored to make it clear that nothing of the Award survived its expiration date. It is the work rules resulting from the Award that endure, by virtue of the Railway Labor Act; they are deemed to be incorporated into the prior agreements of the parties that themselves endure by virtue of the Railway Labor Act unless and until changed in accordance with that statute. We must therefore discern what "work rules" were put into effect under and prior to the expiration of Award 282.

The Award did not dispense with the use of firemen. It began by continuing in force all "agreements, rules, regulations, interpretations, and practices, however established," except as modified by the Award. The Award provided procedures whereby the carriers could mark firemen jobs for extinction, and also established a reciprocal power in the local BLFE chairman to immunize from elimination ten percent of the crews listed. The Opinion of the Neutral Members of Board 282 makes abundantly clear that the Board recognized that the Award had the effect only of sanctioning a procedure of limited duration for accomplishing a reduction in crew consist and the use of firemen. The Board explained that it was conscious that the immediate impact of the Award might be small, but that this was a deliberate choice reflecting concern for the human factor in the equation and the goal that the Award would establish some principles that could contribute to a final solution to the problems:

> The Board's award will remain in force only two years. Within that time the effect of attrition may be such that the number of firemen or train crew jobs actually eliminated may be comparatively small. *Opinion of Neutral Members,* 41 LAB. ARB. 680, 681.

The Board members themselves characterized what they did as having "established a *procedure* for determining whether, considering safety, workload, and adequacy of transportation service, particular jobs should be made subject to elimination." (p. 681) (Emphasis added). In explaining why the Award provided that the union could insist on saving ten percent of the jobs marked for elimination, the Neutral Members reasoned that this procedure would obviate the possibility of objections, based on safety or convenience, to individual proposals for job reduction. The underlying premise, as explicated by the Board, was that the Award would be able to authorize such reductions only during two years, and unless an efficient procedure were provided for making specific decisions "the likelihood of reducing [the number of disputes over individual jobs] significantly in a two-year period would not be very great." (p. 690). Because of the two-year limitation on the Award, the Board doubted that any standards it might

prescribe could be applied in particular disputes "in sufficient time to yield any significant results." (p. 690).

As the event turned out the carriers used the Award's procedures to terminate many more firemen jobs than the Board predicted.[1] The Neutral Members' underestimate does not undercut but rather underlines the view that the mechanics for reduction in firemen jobs were procedures of necessarily limited duration, rather than work rules with continuing vitality.

Our conclusion is that the provisions in the Award for establishing new firemen levels did not constitute "work rules" in the classic sense, as we have used and applied that term, but instead are more accurately described as procedures for establishing new work rules. The history of labor relations agreements in this industry reveals that the manning work rules were expressed in terms of ultimate results, like one-conductor-and-three-brakemen, or firemen-required-on-all-freight-locomotives, and were not formulated in terms of a methodological approach. This practical construction of the concept of work rules is reinforced by the Board's expressions treating the mechanics of lists and designations as procedures. Accordingly, for purposes of determining what "work rules" were in force on the last day of the life of Award 282, we do not consider the procedures provided by the Award for changing job requirements as being themselves part of the substantive "work rules." These procedures, like the procedures for changing substantive work rules for crew consist of trainmen, had no effectiveness after the expiration of the Award.

This construction also gives what we consider the

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[1] In the course of Congressional testimony, Chairman Ralph Seward of Board 282 and Assistant Secretary of Labor James Reynolds indicated that their original expectation was that the procedures would lead to a reduction of about 5500 jobs, rather than the 18000 the carriers succeeded in blanking. *See Hearings on the Administration of Public Law 88-108 Before the Senate Comm. on Commerce,* 89th Cong., 1st Sess., ser. 89-45 at 363-64, 465-66 (1965). And according to Senator McGee, the number of firemen eliminated also exceeded the expectations of "Members of the U.S. Senate." *Hearings on the Administration of Public Law 88-108 Before the Senate Comm. on Commerce,* 89th Cong., 2d Sess., ser. 89-56, at 1030 (1966).

appropriate effect to the undeniably significant provisions in Public Law 88-108 and Award 282 that limited the effectiveness of the Award to two years. Since the Award did not become effective for sixty days after filing, the parties had more than two full years to plan its implementation The pre-existing work rules, contained in the National Diesel Agreement of 1950, stipulated that "A fireman, or a helper, taken from the seniority ranks of the firemen, shall be employed on all locomotives." Award 282 continued this requirement (and any others stemming from agreement or practice), until changed in accordance with the Award. For two years plus, the carriers had the machinery for proposing, at three month intervals, the crews that they thought could safely and efficiently dispense with firemen positions. The fruits of these notices and negotiations, after adjustment for the Union's ten percent retention, effected what must be regarded as new "rules" applicable to the particular runs involved. But when the Award expired, so did the procedures it suggested. What survives is the complex of work rules in force on the last day prescribing the substantive terms that controlled the use of firemen on individual runs.

In consequence, a carrier is not only prevented from taking "affirmative acts" under the Award to reduce the use of firemen, as the District Court properly held, but also, if the carrier was required to keep a fireman on a particular crew as of the last day of the Award, it cannot thereafter change the work rule by discontinuing that position, except by agreement or in accordance with Section 6. The work rule that continues in force provides for a fireman on this crew, and that is not changed because the particular fireman on duty dies or retires.

Conversely, however, if the work rule in effect on the last day of the Award provided that a fireman was not required for a particular engine crew—because that crew was included on the carrier's list of proposed blankable jobs and the union's local chairman did not designate it for retention of a fireman, within the ten percent of crews he could control—the work rule does not require a fireman on that crew even though for one reason or another the carrier had not removed or transferred that fireman by

the end of the effective period of the Award.[2] The carrier may thereafter transfer him, or refuse to replace him when he dies or retires. Such action would not constitute a change in work rules but simply an action in accordance with the work rule in force on the critical date, a rule which provided that no fireman was required for that crew.

The National Diesel Agreement was not set aside by the Board. As already noted, the opening section of the Award provided that agreements in force continued in effect except as they were modified by the Award. The Award provided a procedure for modifications during the two-year life of the Award. We recognize that it may be turning back the clock to an era that two presidential boards and the Neutral Members of Board 282 have agreed is technologically outdated, but taking into account the structure of Award 282 as issued, we see no alternative to holding that any new runs created after Award 282 are subject to the National Diesel Agreement, and its requirement of a fireman on each engine crew.

Moreover, the National Diesel Agreement is in effect even though the only reason why a change in its work rule was not made under the Award during its lifetime was the fact that the change was blocked by a state's full crew law. The Supreme Court has expressly held that while such state law was in effect the Board had no capacity to make a change contrary to its provisions. *See Brotherhood of Locomotive Engineers* v. *Chicago, Rock I. & Pac. R.R.*, 382 U.S. 423 (1966). The opening sections of the Award dealing with the use of firemen and with crew consists provided for the continuation of work rules, however established, unless changed pursuant to the Award. The repeal of a full crew law subsequent to the expiration of Award 282 came after expiration of the Board's authority under the temporary statute and after expiration of the power of a carrier to invoke the procedures of the Award.

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[2] The work rules effectuating the changes made under the Award included the ancillary protective provisions of Part II.C for individuals transferred or separated in implementing the change. These work rules continued in effect after the Award.

II *Validity of Awards Made January 25, 1966.*

In one respect we have decided to grant reconsideration and modify our opinion as requested by the carriers. In our opinion of May 12, we held that Award 282 was no longer in existence on January 25, 1966, when a special adjustment board rendered crew consist awards between the BRT and two carriers, and that therefore these awards were without legal significance.

We rejected by implication the carriers' argument in brief that the BRT had stipulated to the contrary. On rehearing the carriers point out decisions interpreting statutory provisions that an act be done within a specified period from the date of another action or event so that the initial or trigger date is excluded from the computation. As we were aware, that is of course the modern doctrine and is established by the decisions of this court among others.[3] It is the rule adopted by Rule 6 of the Federal Rules of Civil Procedure. We thought this rule inapplicable because the starting date did not involve problems of a fractional day, and was in turn determined by a still earlier computation beginning with an initial date that was concededly excluded from computation. This led us to the view that the two-year period prescribed by the Act as the life of the Award did not extend beyond 731 full days (two years of 365 days each, plus February 29, 1964), and that the Award which started at 12:01 a.m. on January 25, 1964, should not be stretched to include the 732nd day of January 25, 1966. We felt that in the peculiar setting of this law that legislative consideration should prevail over the customary formula for computing time.

On further reflection, we think that while this analysis may be sound for an appraisal of the problem in the first instance, a doctrine not adverted to by the parties preempts the question. There is hornbook learning to the effect that where there is doubtful language in a statute for performance of an act, the courts prefer that which will confirm rather than destroy any bona fide transaction

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[3] *E.g.*, Freeman v. Pew, 61 App. D.C. 223, 59 F. 2d 1037 (1932); Burnet v. Willingham Loan & Trust Co., 282 U.S. 437, 439-40 (1931); Prince v. United States, 185 F. Supp. 269, 271-272 (E.D.Wis. 1960).

or title. 52 AM. JUR. *Time* § 18 (1944). This is powerfully underscored by the doctrine, highly relevant to modern needs, that where statutes have been entrusted to administrative agencies for implementation, their construction should be given effect unless plainly unreasonable or in conflict with the plain intent of the legislature.

Board 282 was keenly aware of the problems it faced in possessing only temporary authority. It purposefully selected a standard for the manning rule for firemen that could practicably be administered within that limited time. When the special board assumed that it had the authority to act on January 25, 1966, it must be presumed to have considered the question carefully and with a view to conforming to the intent of Congress as nearly as it could discern that intent.

We note that the Union did not promptly protest the awards as untimely. And further indication that even the Union regarded the time question as at least doubtful appears from the fact that their notices used a January 26, 1966 date as the effective date for proposed changes. We acquiesce in the interpretation of this doubtful question by the special board involved, since we cannot say this interpretation was unreasonable or violated any plainly ascertainable legislative intent. Accordingly we honor the board's conclusion that January 25, 1966 was the final day of the Award, and hold that the special arbitration awards rendered on that date were effective.

III *Applicability of Section 8 of the Norris-La Guardia Act.*

A. Brotherhood of Railroad Trainmen (BRT)

Appellant Union seeks a ruling that even assuming the District Court had jurisdiction to issue a restraining order, the issuance of the order reflected error in this case.

We are clear that the District Court was correct in holding that it had jurisdiction to enjoin a violation of the Railway Labor Act, and that this jurisdiction was not negatived by or subject to Section 4 of the Norris-La Guardia Act. We affirmed that conclusion in No. 20316, and fully adhere to that ruling.

Although the District Court had jurisdiction to issue the restraining order we think it erred in doing so because—

as we subsequently held in our May 12, 1967 ruling—the complainant carriers had failed to comply with their obligations under the Railway Labor Act. Section 8 of the Norris-La Guardia Act, 29 U.S.C. § 108 (1964), provides that a federal court shall not grant a restraining order or injunction in a labor dispute where the complainant "has failed to comply with any obligation imposed by law which is involved in the labor dispute in question."

The issuance of the restraining order was conditioned on the carriers' posting a bond to make good damages, not to exceed $10,000, sustained by any party wrongfully restrained. We think the Union, which had to obey the injunction or suffer penalties for contempt of court, is entitled to a ruling from this court that vacates an erroneous determination of the District Court, although of course we do not purport to describe what if anything the Union is entitled to collect on the bond.

The District Court erred in concluding that because it held, correctly, that the action was not subject to Section 4 of the Norris-La Guardia Act, which would have ousted the court of jurisdiction, it necessarily followed that the "clean hands" provision of Section 8 of the Norris-La Guardia Act was likewise wholly inapplicable. The Supreme Court has said, speaking through the Chief Justice, that "there must be an accommodation" of this Act with the Railway Labor Act. *Brotherhood of Railroad Trainmen* v. *Chicago R. & Ind. R.R.*, 353 U.S. 30, 40 (1957). That principle of accommodation means that actions to enjoin violations of the Railway Labor Act may be maintained without regard to Section 4 of the Norris-La Guardia Act, and yet be subject to Section 8 of that Act. That is the conclusion of other courts which have considered the matter,[4] and we agree. The point is, simply, that

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[4] *See* Rutland Ry. v. Brotherhood of Locomotive Eng'rs, 307 F. 2d 21, 37-40 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); Chicago, Rock I. & Pac. R.R. v. Switchmen's Union, 292 F. 2d 61, 64-66 (2d Cir. 1961), *cert. denied*, 370 U.S. 936 (1962); Elgin, J. & E. Ry. v. Brotherhood of Railroad Trainmen, 302 F. 2d 540, 544-45 (7th Cir.), *cert. denied*, 371 U.S. 823 (1962); Manning v. American Airlines, Inc., 221 F. Supp. 301, 304-06 (S.D. N.Y. 1963); *cf.* Brotherhood of Railroad Trainmen v. Toledo P. & W.R.R., 321 U.S. 50, 60-65 (1944); Brotherhood of Railway Clerks v. Florida E. C. Ry., 384 U.S. 238, 247 n.8 (1966); Brotherhood of Railroad Carmen v. Chicago & Nw. Ry., 354 F. 2d 786, 794-76 (8th Cir. 1965).

Congress did contemplate actions to effectuate the Railway Labor Act by enjoining violations.[5] That purpose would be utterly defeated if the federal court actions involved were subject to Section 4 of the Norris-La Guardia Act, which had provisions for withholding injunctions in labor disputes reflecting entirely different objectives.

On the other hand a ruling that Section 8 of the Norris-La Guardia Act is applicable to actions to enjoin violations of the Railway Labor Act would not trammel but would rather further the effectuation of that Railway Labor Act, for it ensures compliance by complainant carrier or union which cannot seek an injunction until and unless it has discharged the obligations imposed by the Railway Labor Act.

It may be that in a particular case the District Court might conclude that the imperatives of the Railway Labor Act override Section 8—a statutory focusing so to speak of an equity approach whereby lack of clean hands may be overcome by a balancing of interests, particularly where it is the public interest involved. In a particular case the District Court might conclude that the question of the applicability of Section 8 was doubtful, would require time to explore, and that the restraining order should issue forthwith to avoid jeopardizing the Railway Labor Act. Such approaches would recognize that Section 8 of the Norris-La Guardia Act has some applicability, and is a legislative instruction that weighs heavier in the scale than the clean hands doctrine taken merely as a general equity maxim, yet is overborne by requirements of the Railway Labor Act. Here, however, the approach of the District Court was that Section 8 of the Norris-La Guardia Act was completely inapplicable and that was error. In saying that the restraining order was erroneously entered, however, we do not mean that would excuse a contemptuous violation.

We have said enough to demonstrate that the approach used by the District Court was erroneous. As we have decided, the complainants lack clean hands and the defendants were not threatening the violation. Therefore, we now rule that the District Court, taking all circumstances into consideration, should permit the Union to

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[5] Virginian Ry. v. System Federation No. 40, 300 U.S. 515 (1937).

recover on the $10,000 bond if indeed it can establish that it sustained ascertainable damage from the issuance of the restraining order.

B. Order of Railway Conductors and Brakemen (ORCB)

This Union argues that, even assuming its notices of March 23, 1965 were premature (as held in our May 12 opinion), the temporary restraining order against the strike was invalid because Section 8 of the Norris-La Guardia Act prohibits the granting of a restraining order to a complainant "who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

Neither the unclean hands doctrine, nor its crystallization in Section 8 of the Norris-La Guardia Act, operates to deny relief to a complainant merely because it has declined to short-circuit the plan envisaged by Congress for obtaining a durable resolution of vexing questions. Congress contemplated that the parties would resume negotiation after they had garnered experience from actually living with the rules decided upon by the arbitrators after giving "due consideration to the effect . . . upon adequate and safe transportation service to the public and upon the interests of the carrier and employees." (*See* Section 7(a) of Public Law 88-108.) The general requirement in Section 8 for reasonable efforts at negotiation does not contemplate a departure from the assumptions of a specific statutory plan. Therefore, entry of the restraining order was not improper.

* * * * *

The Unions have assumed that a full decree will be entered by this court. We think the proper course is to remand for the District Court to enter decrees in accordance with our rulings. We approve its approach on matters drawn into question except as indicated in our opinions.[6]

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[6] We affirm both the reasoning and result reached by the District Court in construing the effect of the agreements entered into between the BRT and the Kansas City Southern Railway and Louisiana & Arkansas Railway, and the Wichita Terminal Association. We agree that the correspondence

The various judgments and decrees appealed from are accordingly vacated and the causes remanded for the entry of fresh decrees not inconsistent with our opinions.

So ordered.

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between the BRT and the Richmond, Fredericksburg & Potomac Railroad constituted a crew consist agreement of the same duration as an award by a special adjustment board.

We also approve the District Court's holding that Southern Railway Company and its subsidiaries were proper parties plaintiff in suits involving the ORCB and were covered by Award 282.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 20,152, 20,158, 20,172, 20,191, 20,192, 20,193, 20,215, 20,216, 20,229, 20,249

Appeals from the United States District Court for the District of Columbia

Before: DANAHER, Circuit Judge; BASTIAN, Senior Circuit Judge; and LEVENTHAL, Circuit Judge.

JUDGMENT

[Filed July 31, 1967]

These causes came on for hearings on the records of the District Court and the briefs submitted by counsel, and were argued by counsel.

On May 12, 1967, this court filed an opinion in the above-captioned causes, and invited the parties to submit proposed judgments and to request supplemental rulings within ten days thereafter.

The railroads submitted proposed judgments, and requests for supplemental rulings, and filed petitions for rehearing. The unions also submitted proposed judgments and requests for supplemental rulings, and filed oppositions to the railroads' petitions for rehearing.

Upon consideration of the foregoing, it is

ORDERED AND ADJUDGED by the Court that, except insofar as they are granted in the supplemental opinion filed this date, the aforesaid petitions for rehearing are denied; and it is

FURTHER ORDERED AND ADJUDGED by the Court that, insofar as reflected in the supplemental opinion filed this date, the requests for supplemental rulings are granted; and it is

FURTHER ORDERED AND ADJUDGED by the Court that these cases are remanded to the District Court with directions to vacate the orders and decrees appealed from herein and enter orders and decrees consistent with the opinion of this Court filed May 12, 1967, and the supplemental opinion filed this date.

Per Curiam.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 20,192, 20,193, 20,215, 20,216

Before: DANAHER, Circuit Judge, BASTIAN, Senior Circuit Judge, and LEVENTHAL, Circuit Judge, in Chambers.

MEMORANDUM AND ORDER

[Filed September 21, 1967]

These cases were argued on cross-appeals filed by the Brotherhood of Locomotive Firemen and Enginemen (BLFE) in Nos. 20192 and 20193, and by the carriers, Bangor and Aroostook Railroad Co., et al, in Nos. 20215 and 20216.

This court rendered an opinion in these cases, and others consolidated therewith, on May 12, 1967, and filed a supplemental opinion on July 31, 1967.

The carriers filed a petition for rehearing and clarification on August 15, 1967, and on August 25, the BLFE filed a memorandum in opposition to that petition.

The carriers assert, among other things, that this court's opinion, and particularly its supplemental opinion, reflects a misunderstanding of the meaning and application of Award 282 intended by the Board of Arbitration (Board 282).

This court has determined that Board 282 has continuing vitality for deciding questions of interpretation as to the scope and application of the Award. (Opinion of May 12, 1967, pp. 39-40.) It has also made clear that even on a question where the Board did not have final authority, i.e. interpretation of the underlying statute, the court would accept the interpretation of the Board, even though contrary to the interpretation the court would itself have rendered, so long as the Board's interpretation was not unreasonable or contrary to ascertainable legislative intent. (Supplemental opinion of July 31, 1967, p. 15).

ACCORDINGLY, now upon consideration of the foregoing, of this court's opinions above cited, and on the record before the court,

It is ORDERED by the court that the carriers' petition of August 15, 1967 is denied, without prejudice however to the Board's seeking leave within thirty days from the date of this order to submit as amicus curiae a showing of respects, if any there be, in which the opinions of this court are inconsistent with the understanding of Board 282 as to the proper meaning and applicability of its award. Issuance of the mandate will be stayed for thirty days.

It is FURTHER ORDERED that the court's supplemental opinion of July 31 be clarified by the addition of the following as a final paragraph of part I of the opinion (p. 13 of slip opinion).

"The carriers argue in effect that the Award at least authorized the carriers to blank firemen positions during the lifetime of the Award, with this personnel action remaining in a state of suspended animation until its vitalization upon repeal of the full crew law. The Court noted in Rock Island, supra, 382 U.S. at 423:

> Congress wanted to do as little as possible in solving the dispute which was before it, and we note that this dispute was not over the size of crews in States which had full-crew laws.

The Board authorized the carriers to list jobs for blanking, and thus provide a classification "when and if such full crew laws are amended or repealed." Answer of May 17, 1964, to Carriers' Question No. 5 under Section II—Part B(1) and B(2). But this conditional blanking was only available as an advance procedure made fruitful if the necessary condition materialized during the 2-year lifetime of the Award. *See Opinion of Neutral Members,* quoted *supra,* 41 LAB. ARB. at 681. The Board's energy was not limited to "the dispute which was before it [Congress]" at the passage of the law, but also extended to firemen manning disputes arising during the critical 2-year period. But the Board's order and interpretations cannot be stretched beyond the Congressional frame of reference to resolve academic differences or disputes that were neither in being at the time nor projected as arising during the 2-year period."

So ordered.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 20,192, 20,193, 20,215, 20,216

Before: DANAHER, Circuit Judge, and BASTIAN, Senior Circuit Judge, and LEVENTHAL, Circuit Judge.

ORDER

[Filed November 9, 1967]

1. On consideration of the motion of the appellees in Nos. 20,192 and 20,193, and appellants in Nos. 20,215 and 20,216, hereafter referred to as "carriers," to vacate the order entered September 21, 1967, denying the carriers' petition for rehearing and clarification, and on consideration of the alternative motion of these carriers for stay of further proceedings, and/or for stay of mandate pending action of Board 282, and on consideration of the opposition to said motions and of the carriers' reply to said opposition; and

On consideration of the communication by Board 282 to the Clerk of this court, October 19, 1967, declining to make any submission to this court as amicus curiae, it having been provided in the order of September 21, 1967, that the mandate be stayed for 30 days and that the denial of the carriers' petition for rehearing and clarification was without prejudice to the Board's seeking leave within 30 days to submit as amicus curiae a showing of respects, if any there be, in which the opinions in this court entered May 12, 1967, and July 31, 1967, are inconsistent with the understanding of Board 282 as to the proper meaning and applicability of its award,

It is ORDERED by the court that the foregoing motions of the carriers are denied.

2. On consideration of the alternative motion of the carriers for stay of mandate pending the filing by the carriers with the Supreme Court of a petition for writ of certiorari,— which motion is construed under the circumstances as a representation under Rule 27(e) that counsel had been instructed to prepare a petition for certiorari,

and that such petition will be filed within the period permitted by law, and on consideration of the motion of appellant in Nos. 20,192 and 20,193 and appellee in Nos. 20,215 and 20,216, for an order staying the mandate and transmission of opinions and certified copy of the judgment,

It is FURTHER ORDERED that the court hereby stays its mandate and transmission of its opinion and certified copy of the judgment for the period permitted by law for filing a petition for certiorari.

So ordered.

APPENDIX B: PUBLIC LAW 88-108

ACT OF AUGUST 28, 1963, 77 STAT. 132, U.S.C. TITLE 45, FOLLOWING § 157

Whereas the labor dispute between the carriers represented by the Eastern, Western, and Southeastern Carriers' Conference Committees and certain of their employees represented by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America, labor organizations, threatens essential transportation services of the Nation; and

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained; and

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not resulted in settlement of the dispute; and

Whereas the Congress finds that emergency measures are essential to security and continuity of transportation services by such carriers; and

Whereas it is desirable to achieve the above objectives in a manner which preserves and prefers solutions reached through collective bargaining; and

Whereas, on August 2, 1963, the Secretary of Labor submitted to the carrier and organization representatives certain suggestions as a basis of negotiation for disposition of the fireman (helper) and crew consist issues in the dispute and thereupon through such negotiations tentative agreement was reached with respect to portions of such suggestions; and

Whereas, on August 16, 1963, the carrier parties to the dispute accepted and the organization parties to the dispute accepted with certain reservations the Secretary of Labor's suggestion that the fireman (helper) and crew consist issues be resolved by binding arbitration but the said parties have been unable to agree upon the terms and

procedures of an arbitration agreement: Therefore be it *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That no carrier which served the notices of November 2, 1959, and no labor organization which received such notices or served the labor organization notices of September 7, 1960, shall make any change except by agreement, or pursuant to an arbitration award as hereinafter provided, in rates of pay, rules, or working conditions encompassed by any of such notices, or engage in any strike or lockout over any dispute arising from any of such notices. Any action heretofore taken which would be prohibited by the foregoing sentence shall be forthwith rescinded and the status existing immediately prior to such action restored.

Sec. 2. There is hereby established an arbitration board to consist of seven members. The representatives of the carrier and organization parties to the aforesaid dispute are hereby directed, respectively, within five days after the enactment hereof each to name two persons to serve as members of such arbitration board. The four members thus chosen shall select three additional members. The seven members shall then elect a chairman. If the members chosen by the parties shall fail to name one or more of the additional three members within ten days, such additional members shall be named by the President. If either party fails to name a member or members to the arbitration board within the five days provided, the President shall name such member or members in lieu of such party and shall also name the additional three members necessary to constitute a board of seven members, all within ten days after the date of enactment of this joint resolution. Notwithstanding any other provision of law, the National Mediation Board is authorized and directed: (1) to compensate the arbitrators not named by the parties at a rate not in excess of $100 for each day together with necessary travel and subsistence expenses, and (2) to provide such services and facilities as may be necessary and appropriate in carrying out the purposes of this joint resolution.

Sec. 3. Promptly upon the completion of the naming of the arbitration board the Secretary of Labor shall furnish to the board and to the parties to the dispute copies of his statement to the parties of August 2, 1963, and the

papers therewith submitted to the parties, together with memorandums and such other data as the board may request setting forth the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement. The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve the matters on which the parties were not in agreement, and shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration.

Sec. 4. To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act. The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed, and the arbitration board shall report to the National Mediation Board in the same manner as arbitration boards functioning pursuant to the Railway Labor Act. The award shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise.

Sec. 5. The arbitration board shall begin its hearings thirty days after the enactment of this joint resolution or on such earlier date as the parties to the dispute and the board may agree upon and shall make and file its award not later than ninety days after the enactment of this joint

resolution: *Provided, however,* That said award shall not become effective until sixty days after the filing of the award.

Sec. 6. The parties to the disputes arising from the aforesaid notices shall immediately resume collective bargaining with respect to all issues raised in the notices of November 2, 1959, and September 7, 1960, not to be disposed of by arbitration under section 3 of this joint resolution and shall exert every reasonable effort to resolve such issues by agreement. The Secretary of Labor and the National Mediation Board are hereby directed to give all reasonable assistance to the parties and to engage in mediatory action directed toward promoting such agreement.

Sec. 7. (a) In making any award under this joint resolution the arbitration board established under section 2 shall give due consideration to the effect of the proposed award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation.

(b) The obligations imposed by this joint resolution, upon suit by the Attorney General, shall be enforcible through such orders as may be necessary by any court of the United States having jurisdiction of any of the parties.

Sec. 8. This joint resolution shall expire one hundred and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence.

Sec. 9. If any provision of this joint resolution or the application thereof is held invalid, the remainder of this joint resolution and the application of such provision to other parties or in other circumstances not held invalid shall not be affected thereby.

Approved August 28, 1963.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 859

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Petitioner*,

v.

BANGOR AND AROOSTOOK RAILROAD COMPANY, *et al.*, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS CONCERNING PETITION FOR WRIT OF CERTIORARI

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005
Of counsel for respondents.

FRANCIS M. SHEA
RICHARD T. CONWAY
734 Fifteenth Street, N.W.
Washington, D.C. 20005

JAMES R. WOLFE
Union Station Building
Chicago, Illinois 60606
Attorneys for respondents.

INDEX

Table of Contents

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement of the Case	2
Argument	6

Table of Citations

Hearings on the Administration of Public Law 88-108 before the Senate Committee on Commerce, 89th Cong., 1st Sess.	2, 3, 4, 5
Hearings on H.J. Res. 565 before the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess.	9, 10
Hearings on S.J. Res. 102 before the Senate Committee on Commerce, 88th Cong., 1st Sess.	9, 10
Rule 23 of the Supreme Court	1
Bangor and Aroostook R. Co. v. *Brotherhood of Loc. F. & E.*, 258 F. Supp. 346 (D.D.C., 1966)	6

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Opinions Below

The opinion of the District Court is reported at 253 F. Supp. 682. That opinion has not been appended to the petition, as required by Rule 23(1)(a) and (i) of this Court, but is included as Appendix A to the petition for writ of certiorari filed by respondents herein as No. 933. The opinions of the Court of Appeals (App. A of Petition), not yet officially reported, are unofficially reported at 55 CCH Labor Cases ¶11,912 and 56 CCH Labor Cases ¶12,095.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Question Presented

Upon the expiration of the two-year period in which the Award by Arbitration Board No. 282 "shall continue in force," do the modifications in prior agreements and rules governing the employment of firemen which were made by or pursuant to the Award continue to apply until changed in accordance with the Railway Labor Act, or do the prior agreements and rules automatically revive and apply thereafter until changed in accordance with the Railway Labor Act?

Statement of the Case

Respondents herein are the petitioners in No. 933, which relates to the same judgment and proceeding below. We respectfully refer the Court to the Statement of the Case in that petition for a more adequate and accurate description of the relevant facts and occurrences than is contained in the instant petition.

Insofar as the Statement of the Case in the instant petition is comprised of a discussion of the legislative history of P.L. 88-108 and other legal arguments, we deal briefly with such matters in the Argument section of this brief. Petitioner makes certain factual or quasi-factual statements which are not dealt with in No. 933, however, and which we believe to be erroneous.

Petitioner (Pet., at 12) quotes certain testimony by the Chairman of Arbitration Board No. 282, Mr. Ralph Seward, in the Hearings on the Administration of Public Law 88-108 before the Senate Committee on Commerce, 89th Cong., 1st Sess., and implies that Mr. Seward agreed with petitioner's view that the prior agreements and rules would be automatically restored upon expiration of the Award. Peti-

tioner neglected to mention that both Mr. Seward and another of the Neutral Members of Board 282 (Mr. Benjamin Aaron) made entirely clear that neither they nor the Board were expressing any views on that legal issue, as follows (Hearings, *supra* at 389-390):

> "The Chairman [of the Committee]. What I am trying to get at is when this ends and the board's award expires, what will be our situation, then, and whether or not this committee, or yours, or all of us here, the brotherhoods and the carriers, ought to, between now and that particular time, sitting down or thinking about it, or trying to work some of these problems out.
>
> "Mr. Seward. As a private citizen, sir, I would urge that such things be done.
>
> • • • • •
>
> "The Chairman. Could the award board, your board, reconvene before that time to take up some of these problems?
>
> "Mr. Seward. We have authority, sir, only to reconvene as we are. We are meeting 2 weeks from now to interpret questions submitted to us in writing. We have no authority to consider the effect after the award as a legal board.
>
> "The Chairman. But your interpretation of the disputes could be—and I could see where it might be, in many cases—helpful in arriving at some conclusions before you go out of business.
>
> "Mr. Aaron. Senator, I don't think there would be any agreement among the members of the board that the board had any authority even to make a recommendation in respect to that particular issue.
>
> "We have speculated about it from time to time, all of us wondering what the legal effect would be when the

date of the expiration of the award takes place, whenever that date may be, which is also uncertain, but I think it safe to say that the parties believe that is a matter that should be left to them to determine, or certainly, that it should not be for this board to determine, or even to attempt to interpret for the parties.

"The Chairman. You have answered my question. I was hopeful that you might suggest that without authority, you might be helpful.

* * * * *

"The Chairman. Specifically, after the expiration of the award, whatever the date may be, what will be the status of the dispute between the railroads and the brotherhoods involving the firemen, first?

"Mr. Seward. I wish I could answer that question, sir.

"The Chairman. It will be open?

"Mr. Seward. Certainly."

Indeed, Board 282 has formally ruled that the issue as to the rules in effect following the expiration of the Award, which involves an interpretation of P.L. 88-108 and the Railway Labor Act rather than of the Award, is not within its jurisdiction to decide. See the petition in No. 933, fn. 13, at 31.

Petitioner states (Pet., at 12-13) that, during the period of the Award, respondents "effected the severance from employment of some 18,000 men" which "was three times as great a reduction as the Arbitration Board itself had expected . . . ." That statement is erroneous. As the parties stipulated (JA 132), respondents "reduced the number of firemen (helpers) in their employ by about 18,000 . . . ." But most of that reduction in the number of firemen employed by respondents resulted from their promotion to

better jobs as locomotive engineers or from natural attrition, rather than from their severance from employment pursuant to the Award. Of the 17,250 firemen's positions that were eliminated during the first 14 months of the Award, only 3,160 represented the severance of firemen who were not entitled to offers of comparable jobs; 4,465 firemen were separated from employment after refusing offers of comparable jobs, and the remainder either accepted offers of comparable jobs, were promoted to engineer positions, or ceased their employment by reasons of natural attrition. Hearings, *supra* at 510. In fact, therefore, the number of firemen separated from employment pursuant to the Award did not greatly exceed the lowest estimates, and it seems safe to say that any excess in that regard largely resulted from the fact that almost all of the firemen entitled to offers of comparable jobs (with five-year guarantees against any reduction in pay) elected, instead, to accept the generous separation allowances provided by the Award. Moreover, as the Chairman of Board 282 testified, "we were not thinking in terms of the number of jobs that would be eliminated. We were trying to think of the fairest system for procedures for elimination of jobs, giving protection to different kinds of employees, according to their attachment to industry, length of time they had served or so forth, and endeavoring to work out a fair set of procedures and rules which we thought would be effective and fair." Hearings, *supra* at 364. Mr. Seward testified further that it remained his "judgment today . . . that the 10-percent margin [jobs which the union could veto] was adequate to protect the undue burdening of other workers, the maintenance of safety and the protection in jobholding of those who are entitled to it . . . ." Hearings, *supra* at 362.

Petitioner (Pet., at 14) quotes the opinion of the Court of Appeals for the statement that "Notice No. 1," which

was served by petitioner under Section 6 of the Railway Labor Act prior to the expiration of the Award, "would have pegged employment at a level of 6,000 jobs below the terms of the National Diesel Agreement." There is no support in the record for that statement, none was cited by the Court of Appeals (Pet., at 25a), and respondents understand Notice No. 1 (JA 144-147) to propose a rule requiring the use of firemen on virtually all locomotives.

Finally, petitioner asserts (Pet., at 16) that the trial judge, in rulings subsequent to his judgment of May 12, 1966 (JA 231-237), "diluted even further his 'affirmative acts' proscription." In fact, the trial judge merely interpreted his judgment to mean what it plainly said (in factual contexts considerably more complicated than petitioner indicates) whereby respondents were authorized to continue to apply their rules for the employment of firemen as modified by Award 282, until such rules were changed in accordance with the Railway Labor Act. See *Bangor and Aroostook R. Co.* v. *Brotherhood of Loc. F. & E.*, 258 F. Supp. 346 (D.D.C., 1966), appeals by BLF&E pending, Nos. 20472, 20473, 20647 (D.C. Cir.).

Argument

As we have noted, the respondents to the instant petition are the petitioners in No. 933, and both petitions seek review of the same judgment below. While the parties complain about different aspects of that judgment, many of the considerations involved are the same with respect to both petitions. The fundamental premise of the carriers' position is that the Congress intended the Railway Labor Act to govern the situation following the expiration of Award 282. In No. 933 we show that the Court of Appeals (as well as the District Court) agreed with that premise, but fell into error in certain of its interpretations of the Railway Labor

Act. In this petition, the union attacks that fundamental premise and contends that the Congress intended, regardless of the Railway Labor Act, that the National Diesel Agreement and other prior agreements and rules governing the employment of firemen were to be automatically restored to full effect upon the expiration of the Award.

We believe that the union's position in this regard is without foundation in P.L. 88-108, in its legislative history, in the Railway Labor Act and in reason, as well as having been rejected by both courts below. We recognize, however, that the Court probably will not attempt to determine who is right and who is wrong upon the basis of the petitions and responses thereto, as such matters normally are determined only after full briefing and argument. Since we are convinced that the petition in No. 933 presents important issues which should be reviewed by this Court, and in view of the considerations stated above, we do not oppose the grant of this petition if the petition in No. 933 also is granted.

We emphasize, however, our view that there is no support for petitioner's contention that the National Diesel Agreement and other prior agreements and rules governing the employment of firemen were intended to be restored automatically upon expiration of the Award. Petitioner relies upon the fact that the Award, under its own terms and as required by P.L. 88-108, expired after two years. But that fact merely poses the issue as to what rules are to govern the employment of firemen after the expiration of the Award; it does not provide the answer to that issue. This is also true, of course, with respect to the references in the legislative history to the fact that the Award was to expire after two years or to the "interim" or "temporary" nature of the proposed legislation.

Indeed, most of the legislative history relied upon by petitioner (Pet., at 5-15) relates to the Administration's bill

rather than to P.L. 88-108 as eventually enacted.[1] But despite relying upon that legislative history, petitioner carefully refrained from noting that both the language of the Administration's bill and the full committee testimony with respect thereto left no doubt about the situation which would follow expiration of the I.C.C. regulations proposed therein. That situation would *not* have been restoration of the National Diesel Agreement and other prior agreements and rules governing the employment of firemen. Rather, in the absence of an agreement or further legislation, the 1959 and 1960 Section 6 notices would have remained outstanding and both parties would have been free to resort to self help with respect thereto—the carriers could implement their proposal giving them full discretion over the employment of firemen and the union could strike.[2]

Pertinent provisions in the Administration's bill are quoted in the petition in No. 933, at 16-17, and supporting testimony by Secretary of Labor Wirtz in the hearings is there cited. Without attempting to set that testimony out in full, we think it sufficient at this stage to quote two examples:

---

[1] This is true of the President's message, the statement by Senator Morse and all of the committee hearings. Of the legislative history quoted in the petition, the only exceptions are the statements in the committee reports (Pet., at 6-7) merely noting the fact that the Award was to expire after two years, and the statement by Congressman Harris in the floor debates (Pet., at 7-8). The statement by Congressman Harris supports respondents because he there made plain that, after the two-year period, "it goes back to the usual collective bargaining processes." In the railroad industry, the "usual collective bargaining processes" are those provided by the Railway Labor Act. See the petition in No. 933, at 19.

[2] In addition, the parties would have been expressly required to continue bargaining upon the 1959 and 1960 Section 6 notices. The legislative history cited by petitioner (Pet., at 13-14) to the effect that such bargaining should and would occur was directed to that requirement in the Administration's bill. See the petition in No. 933, at 16-17, 39-40.

"Senator McGee. What happens, again for the record, to an interim rule that expires without any negotiated rule having been made during the 2-year life?

"Secretary Wirtz. And no renewal of the resolution?

"Senator McGee. Yes.

"Secretary Wirtz. It would mean that section 6 notices now in effect would still be standing and that there would be a right of either party to take whatever course of action it wanted at that time." Hearings on S.J. Res. 102 before the Senate Committee on Commerce, 88th Cong., 1st Sess., at 81.

"Mr. Devine. I think I know the answers to this, but I think it should be made clear in the record. Say all of the gymnastics provided in this bill are gone through and the procedures are followed and the Interstate Commerce Commission makes recommendations, and let us say the brotherhoods in this instance would not agree to go along with the recommendations. Would they then be free to strike?

"Secretary Wirtz. After the interim rule had been in effect for the 2-year period, then assuming there is no agreement, the situation would be that they would be at that point unless there was further action taken by the Congress." Hearings on H.J. Res. 565 before the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess., at 107.

Secretary Wirtz also agreed that there was "a strong likelihood the President would recommend an extension" of the legislation if the dispute was not settled during the two-year period of I.C.C. regulation, and stated that consideration would be given to calling "a special session of the Congress" if the Congress was not in regular session

at the time. Hearings on S.J. Res. 102, *supra* at 55-56, 61. Thus, petitioner's president, Mr. H. E. Gilbert, testified that "I further have a strong feeling that at the expiration of . . . 2 years or 10 years, the same medium to oppose us from our exercise of our self help would be imposed upon us." Hearings on H.J. Res. 565, *supra* at 822.

The only interpretation of the Administration's bill contrary to that of Secretary Wirtz was given by counsel for one of the other unions, who thought that the I.C.C. rules would remain in effect after the two-year period but would then be subject to change under the Railway Labor Act. Hearings on H.J. Res. 565, *supra* at 682. No one suggested that the National Diesel Agreement and other prior agreements and rules would have to be restored, as petitioner now contends, either under the Administration's bill or under P.L. 88-108 as eventually enacted.

In the petition filed as No. 933 (pp. 16-27, 36-40), we have demonstrated that the Congress rejected the Administration's bill and adopted the arbitration provisions of the Railway Labor Act so as to bring about a "complete and final disposition" of the 1959 and 1960 Section 6 notices. In so doing, the Congress intended that the expiration of Award 282 should have the same effect as the expiration of any other collective bargaining agreement or arbitration award under that Act. Under that Act, the rights and duties of the parties to such an agreement or award are not changed by the expiration of the agreement or award, but continue until changed pursuant to new Section 6 notices in accordance with the Act. The purpose and effect of an expiration date in the agreement or award is to permit the parties thereafter to proceed under the Act with bargaining upon new Section 6 notices proposing changes, rather than to restore the situation in effect prior to such agreement or award. Since the parties to the two petitions are identical,

we see no need to repeat herein the support for these propositions which we have set forth in No. 933.

Respectfully submitted,

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005
Of counsel for respondents.

FRANCIS M. SHEA
RICHARD T. CONWAY
734 Fifteenth Street, N.W.
Washington, D.C. 20005

JAMES R. WOLFE
Union Station Building
Chicago, Illinois 60606
Attorneys for respondents.

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IN THE

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OCTOBER TERM, 1967

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v.

THE AKRON & BARBERTON BELT RAILROAD COMPANY, ET AL., *Respondents.*

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INDEX

APPENDIX:

Page

A—Opinion of District Court, March 3, 1966 ..... 2a

B—Opinion of District Court March 28, 1966 ..... 16a

C—Opinion of District Court, April 19, 1966 ..... 25a

D—Opinion of District Court, May 19, 1966 ..... 30a

E—Opinion of Court of Appeals, May 12, 1967 ..... 33a

F—Opinion of Court of Appeals, July 31, 1967 ..... 75a

G—Judgment of Court of Appeals, July 31, 1967 ..... 91a

H—Memorandum and Order of Court of Appeals, September 21, 1967, in *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor and Aroostock Railroad Company, et al.*, Nos. 20192, 20193, 20215 and 20216 ..... 92a

I—Award by Arbitration Board No. 282, November 26, 1963 ..... 95a

J—Statutes Involved 111a

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APPENDIX A

Opinion

Francis M. Shea and Richard T. Conway, both of Washington, D. C., for the plaintiffs.

Milton Kramer, of Washington, D. C., for defendants Brotherhood of Railroad Trainmen, et al.

James D. Hill, of Washington, D. C., for defendant Order of Railway Conductors and Brakemen.

This is an action brought by a group of railroads against several organizations of railway employees for an injunction against calling a strike and for a declaratory judgment. The suit was instituted in the light of the termination of the effective period of two years, of an award of a compulsory arbitration directed by Congress in respect to certain issues in controversy between the parties. A temporary restraining order was granted at the institution of this action and has been extended by consent to continue until after the trial.

Pursuant to a pretrial order made with the consent of the parties a hearing has been held on the following two basic issues in advance of the trial: (a) the effect of the expiration of the period during which the Award of Arbitration Board No. 282 continued in force, as provided in Section IV of that Award pursuant to Section 4 of Public Law 88-108; and (b) whether the Norris-LaGuardia Act is applicable to the plaintiffs' request for injunctive relief. This decision deals with these two questions.

At the outset it is desirable to analyze and summarize the somewhat complicated system prescribed by the Railway Labor Act (Act of May 20, 1926, 44 Stat. 577, as amended, 45 U.S.C. §§151 *et seq.*) for amicable adjust-

ments of labor disputes in the railroad industry. The statute contains a well conceived, carefully planned, elaborate scheme for the settlement of differences between carriers and their employees by means of negotiation, mediation, and arbitration. It provides in detail certain specified steps to be pursued in chronological order when such a controversy arises. Neither employers nor employees may unilaterally make or insist on any changes in agreements affecting rates of pay, rules, or working conditions, without first exhausting the remedies provided by the Act.

The initial step to be taken either by a carrier or an organization representing employees, in the event that it desires an alteration in an existing arrangement, is to serve a 30-days' written notice of its intention to achieve the change. The time and place for the beginning of conferences between the representatives of the parties, are then to be agreed upon within ten days after the receipt of the notice. The date of the first conference must be within the 30-day period provided in the notice, Railway Labor Act, Sec. 5, 45 U.S.C. §155.

The Act further provided for the creation of the National Mediation Board appointed by the President, Railway Labor Act, Sec. 4, 45 U.S.C. §154. If the negotiations between the parties do not result in a settlement of the dispute, either party is authorized to invoke the assistance of the Mediation Board. In addition the Mediation Board is empowered to proffer its services on its own initiative, in case of an emergency.

If the negotiations and mediation still do not lead to an adjustment of the controversy, it may be submitted to a board of arbitration by agreement of the parties, Railway Labor Act, Sec. 7, 45 U.S.C. §§157, 158. While such an arbitration is purely voluntary, the statute prescribes the manner of creation and organization of such a board

and the procedure to be followed by it. The award is binding and enforcible.

If either party declines to submit to arbitration and the controversy remains unsettled, and if the National Mediation Board is of the opinion that the dispute would substantially threaten to interrupt interstate commerce, the Board is required to notify the President. The Board is also to notify the parties that its mediation efforts have failed. No change may then be made by the parties for 30 days. An Emergency Board may then be appointed by the President to investigate the dispute. The Emergency Board must report to the President within 30 days from the date of its appointment. After the creation of such Board and for 30 days after the Board has made its report, no change except by agreement may be made by the parties in the conditions out of which the dispute arose.

At the expiration of the last mentioned 30-day period the remedies provided by the Railway Labor Act are exhausted. If the dispute still remains unresolved, presumably either party may act unilaterally and resort to self help. To state it more bluntly, the railroads may then proceed to make the desired changes in rates of pay, rules or working conditions, or discharge employees whom they deem unnecessary. On the other hand, representatives of the employees may call them out on strike. Industrial strife is in the offing. If the dispute is on a sufficiently large scale, the possibilities of serious detrimental and even disastrous effects to the public, are readily envisaged. Lack of any further safeguard after the last stage of the statutory arrangement is passed, is the Achilles' heel of the enlightened and beneficent plan provided by the Railway Labor Act. This possible contingency is manifestly inescapable. It was hoped and even expected that the controversy would be settled at one of the earliest stages before the impasse is reached. In most

cases the hope and the expectation proved well-founded. Unfortunately in the nationwide controversy involved in this litigation, they were not realized.[1]

The plan for the amicable adjustment of disputes consisting of a series of successive steps and stages that have been described, is not hortatory or precatory. It is legally binding and enforceable, except that an arbitration cannot be compelled. The leading decision on this subject is *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, in which Mr. Justice Stone (later Chief Justice) wrote an historic opinion, speaking for a unanimous bench. This case breathed the spirit of life into the Railway Labor Act. It overruled the contention of a railroad company that there was no duty to negotiate pursuant to the notices referred to in the statute. The Court held that on the contrary there was an obligation enforceable by legal sanctions to act under the various provisions of the Act. Specifically the Court ruled that it was the duty of the parties to negotiate after notices were served, and that this duty was enforceable by judicial decree. It sustained an order compelling the carrier to do so. On this point Mr. Justice Stone wrote as follows (pp. 548, 552):

> The statute does not undertake to compel agreement between the employer and employees, but it does command those preliminary steps without

[1] The Railway Labor Act also established a parallel system for the disposition of another category of controversies, known as "minor disputes", i.e., disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, as distinguished from "major disputes", i.e., controversies concerning what agreements should be reached to govern such matters. For the purpose of determining minor disputes the statute created a National Railroad Adjustment Board, whose duty is to hear and decide such disputes, and whose decisions are legally binding. Any party to such a dispute may refer it to the Adjustment Board, Railway Labor Act, Sec. 3, 45 U.S.C. § 153. In effect, a system of compulsory arbitration was created and has been in operation since 1926.

> which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by §2, First.
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> The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern.
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> The fact that Congress has indicated its purpose to make negotiation obligatory is in itself a declaration of public interest and policy which should be persuasive in inducing courts to give relief.

These views were reiterated in *Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711, 719, in which Mr. Justice Rutledge wrote the opinion.

The present controversy had its inception on November 2, 1959, when most of the Class 1 railroads in the United States, many of whom are plaintiffs in the present action, served notices, pursuant to Section 5 of the Railway Labor Act, on organizations of railroad employees, stating that it was their intention to eliminate numerous employees whose services had become unnecessary as a result of technological improvements. Specifically it was proposed to eliminate firemen on diesel engines in freight and yard service, and to reduce the number of members of the train crew on numerous runs. On September 7, 1960, employees' organizations served counter-notices, the purport of which indicated an intention to maintain the existing conditions. As soon as the first group of notices was served, the remedies prescribed by the Railway Labor Act were immediately brought into play: negotiations

took place; the services of the Mediation Board were invoked; and eventually when arbitration was declined, an Emergency Board was created and made its report. During the intervening period, the President appointed a Special Commission which likewise made an investigation and presented a report.

With the creation of the Emergency Board and the submission of its report, all the remedies afforded by the Railway Labor Act were exhausted without avail. As the Supreme Court held in connection with this controversy, the parties were then relegated to self help in adjusting their disputes, *Brotherhood of Locomotive Engineers* v. *B. & O. R. Co.*, 372 U. S. 284. In other words, the railroads were free to dispense with the services of numerous employees in accordance with the proposal contained in their notices of November 2, 1959. On the other hand, the railroad employees were free to strike.[2]

By this time it was August, 1963. The country was confronted with the specter of a nationwide railroad strike, which would paralyze industry. Disaster and havoc were feared. Congress acted expeditiously in order to stave off such a catastrophe. A Joint Resolution was promptly passed, which became law on August 28, 1963, Public Law No. 88-108, 77 Stat. 129. It commanded a compulsory arbitration of the two principal issues in dispute between the parties.

This enactment expressly prohibited any changes in rates of pay, rules, or working conditions covered by the groups of notices respectively served by the carriers and labor organizations, except by agreement or pursuant to an arbitration award. It explicitly prohibited any strike or lock-out (Sec. 1). It directed the creation of an Arbi-

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[2] A brief history of the dispute is contained in the opinion of this Court in *Brotherhood of Locomotive Firemen and Enginemen* v. *Chicago, B. & Q. Ry. Co.*, 225 F. Supp. 11, 14-15.

tration Board to pass on two issues: the use of firemen on other than steam-powered locomotives in freight and yard service; and the size and composition of train crews (Secs. 2 and 3). Thus, Congress in effect ordered a compulsory arbitration of these two basic issues. It provided that the arbitration should be conducted pursuant to the applicable sections of the Railway Labor Act, 45 U.S.C. §157-159. The award of the Board was to be binding on the parties. It was to be filed in the United States District Court for the District of Columbia. It was to be in effect for such period as the Arbitration Board should determine, but not to exceed two years from its effective date, unless the parties agreed otherwise. In all other respects, the statute was to expire 180 days from the date of its enactment.

The Arbitration Board, which eventually became known as Board No. 282, was constituted as required by the Joint Resolution, held hearings, and rendered its award on November 26, 1963. The effective date of the award was January 25, 1964. Pursuant to its terms, it remained in effect until Jauary 25, 1966, except that it was extended for a couple of months by agreement in respect to several, though not all, of the organizations of employees.

The pertinent provisions of the award may be summarized as follows. First, the Board held that firemen were no longer necessary on diesel engines in freight or yard service, except as to ten percent of the firemen, who might be needed for exceptional situations. Nevertheless, all firemen regularly employed on the effective date of the award who had a seniority of ten years or more, were to retain their status and were to continue in their employment until death, resignation, retirement, or discharge for cause. In other words, firemen in this group were accorded practically a permanent tenure for the period of their working lives. Firemen who had seniority of between two to ten years were to receive the same rights, with the

qualification, however, that they might be offered other comparable positions for which they were or could become qualified. In that event they were guaranteed five years' service in their new employment. Firemen who had been hired within two years prior to the effective date of the award were not to be entitled to retain their employment or seniority rights, but if their services were terminated, they were to receive a lump sum termination allowance.

The second issue determined by the Board was to fix the size of train crews, referred to in the parlance of the industry as "crew consist". No change was to be made in any stipulated number of members of train crews except by agreement or pursuant to the provisions of the award. Any party was permitted to give notice of a proposed change and if no agreement was reached, the issue could be referred by either party for decision to a Special Board of Adjustment, to be created in the manner prescribed by the award. A series of specific and concrete principles were formulated and prescribed by the award to be followed by these special tribunals.

There has been considerable activity pursuant to the award. Numerous firemen with less than two years' tenure have been separated from the service and received separation allowances. Many firemen who had been employed for periods from two to ten years have been offered other comparable jobs. Some of these men have accepted these offers. Others have declined to do so. In that event the termination of their employment was accompanied by a separation allowance. Some of the firemen who had more than ten years experience, in the natural order of events, retired, resigned, or died. It is not disputed that there has been a considerable reduction in the number of firemen working in freight and yard service on diesel engines. Undoubtedly, many still remain, even though the Board held that all but ten percent of the firemen were surplusage. So, too, numerous steps were taken pursuant to the

award which resulted in the reduction of the size of train crews on many train runs throughout the country.

The question now arises what is the effect of the termination of the effectiveness of the award, and what may the parties do as a result of the fact that the effective period of the award has come to an end. Both the award and the special Act of Congress are silent on this point. There are several possible constructions of the Act in this regard. It is urged in behalf of the labor organizations that the moment the effectiveness of the award comes to an end, it must be deemed a nullity and the *status quo* that existed before the passage of the Joint Resolution of August 28, 1963, is restored. That *status quo* is, as urged by counsel for the labor organizations, that the rules, rates of pay, and working conditions that existed prior to the service of the notices of 1959 and 1960, respectively, came back in effect, and that parties may resort to self help to compel their enforcement. In other words, it is contended that labor organizations may call a strike unless the railroads re-hire the same number of firemen that they had in service previously to August 28, 1963, and restore the size of every train crew all over the country to the size prevailing prior to that date. Were such a construction to be adopted, everything that has been accomplished by the award would be wiped out except that the fatal day will have been postponed for two years.

As heretofore stated, many employees have been discharged and many jobs have been abolished. It would seem unreasonable to construe the Act of Congress and the award made pursuant to it, as requiring restoration of these positions and a re-hiring of thousands of employees. More than that, if the award becomes a nullity, the permanent tenure that was granted by the award to large groups of employees would be wiped out. The vested rights of an unknown number of employees, probably

large, would be immediately destroyed. This is particularly true of the firemen who had more than ten years' service. Their lifetime security would be abrogated. A question would arise whether the firemen who had accepted comparable jobs with a guaranty of five years' employment, would have a right to insist on the guaranty. Any employee who was re-hired would have to pay back the severance allowance that he had received. Such would be the logical result if the defendants' contention were adopted. As a matter of fact, it would probably be impossible to find immediately a sufficient number of qualified employees to fill the requirements that would be artificially created. Surely Arbitration Board No. 282, composed of eminent and experienced men, could not have contemplated that its work would go for naught, and that the permanent rights accorded by it to thousands of employees would be destroyed at the end of the two-year period. The conclusion is inescapable that the construction urged by the labor organizations is unreasonable and would defeat the very purpose of the legislation and of the award. The Court rejects it.

The doctrine that all statutes should receive a sensible and reasonable construction [3] is equally applicable to the award involved in this case. This Court is of the opinion and concludes that the results of the termination of the effective period of the award of Board 282, are as follows.

No further steps may be taken under the award by either side after its termination date. Thus the railroads may not discharge any more firemen pursuant to the provisions of the award, and they may not initiate proceedings under the award for changing the size and composition of train crews on specified runs. They may not take any other steps under the award. So, too, no new privileges may accrue to employees under the terms of the

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[3] *United States* v. *Kirby*, 74 U. S. 482. *United States* v. *American Trucking Ass'ns.*, 310 U. S. 534.

award. On the other hand, what has been accomplished under the award remains and is not to be nullified or wiped out. Any rights that became vested under the award while it was in effect, remain vested. Thus, the firemen with seniority of more than ten years, who were granted a permanent status for their working lives, retain that status. It is not annulled. The firemen who accepted comparable jobs with a guaranty of five years' employment, preserve the guaranty. Members of train crews who were accorded permanent status under the award do not relinquish it. The employees who have received severance pay may retain the money. They are under no obligation to refund it, as they might have been were the award to be regarded as a nullity. If the award were a nullity, a serious question would arise whether an action in quasi-contract for money had and received under a mutual mistake, might not lie in behalf of the carriers against all former employees who received severance pay.

On the other hand, the carriers have a right to maintain the status that existed on the date of the termination of the award. The vacancies caused by the separation of firemen and members of train crews pursuant to the award, may remain unfilled. To require the railroads to go out and immediately find qualified employees to fill the places that have been abolished would be not only unreasonable, but would lead to an absurdity.

The Court is further of the opinion that the steps taken under the award have resulted in the creation of a new status. The fact that the arbitration was compulsory rather than voluntary does not affect the problem. The award of the compulsory arbitration for this purpose must be regarded as taking the place of an agreement within the meaning of the Railway Labor Act. The Act should receive a liberal construction. The parties have arrived at a new plateau as a result of the proceedings under the award.

The conclusion is inescapable that since a new status has been created under the Act, neither side may take any unilateral action or resort to self help. The carrier may not change rates of pay, rules, or working conditions, including size of train crews, employment of firemen, etc., and, on the other hand, the employees may not call a strike or use other coercive measures in order to enforce their demands. If either side desires to bring about any change in the arrangements resulting from the award, it must initiate proceedings by serving notices under Section 5 of the Railway Labor Act and exhaust each step in the procedure prescribed by that statute. The status existing prior to the award is not restored.

Manifestly the Arbitration Board construed the Act as authorizing it to provide for the creation of rights during the effective period of the award that would endure thereafter. It is an elementary principle of statutory construction that the interpretation of a statute by the administrative agency that administers it, is to be accorded great weight and should ordinarily be accepted unless obviously erroneous or unreasonable.

In view of these considerations, any threatened strike may be enjoined and reciprocally the carriers may be required by judicial decree to submit to the invocation of remedies provided by the Act.

A question was raised by counsel as to the status of the notices that some of the employees' organizations have served during the effective period of the award. The Court is of the opinion and concludes that such notices may not be deemed effective as of a date prior to the termination of the award. It would be a futile gesture, however, to require the parties to serve new notices. A reasonable interpretation of the situation is that the notices that have been served may remain, but that they become effective only on the day after the termination of the award. The various proceedings under the

Railway Labor Act need not be initiated until after that time.

The second question to be determined as a result of this hearing, is whether the Norris-LaGuardia Act, 29 U.S.C. §107 bars the granting of an injunction against a strike, and whether any provision of that Act is applicable to an application for such an injunction. At the outset it may be stated that an injunction against a strike may be properly granted to maintain the *status quo*, while the parties pursue the various steps of negotiation, mediation, or arbitration provided by the Railway Labor Act. Such an injunction is one of the means which the courts may invoke to enforce the provisions of the Railway Labor Act. Equity decrees of other types may likewise be employed for similar purposes.

Thus it was said by Circuit Judge Friendly for the Second Circuit, in *Manning* v. *American Airlines, Inc.*, 329 F. 2d 32, 34:

> The propriety of an injunction to enforce the then unique provisions of the Railway Labor Act for maintaining the *status quo* while the parties to a labor dispute pursue various stages of negotiation, mediation or arbitration, was established long ago.

In *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 562-563, which has already been discussed in some detail, it was held in an opinion by Mr. Justice Stone that the Railway Labor Act supersedes the Norris-LaGuardia Act in the sense that the provisions of the Railway Labor Act "cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act".

In *Brotherhood of Railroad Trainmen et al.* v. *Chicago R. & I.R. Co.*, 353 U. S. 30, in which Mr. Chief Justice Warren delivered the opinion for a unanimous Court, it was expressly held that the use of injunctive relief

to vindicate the processes of the Railway Labor Act, is authorized, and that the specific provisions of the Railway Labor Act take precedence over the more general provisions of the Norris-LaGuardia Act (pp. 41-42). A similar conclusion was reached in *Brotherhood of Locomotive Engineers et al.* v. *Louisville & N.R. Co.*, 373 U. S. 33, 39.

The defendants rely on two cases, which however are clearly distinguishable. In *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50, it was held that a railroad was not entitled to an injunction against a strike if it declined to subject itself to one of the remedies accorded by the Railway Labor Act, in that case the machinery for voluntary arbitration. In *Order of Railroad Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U. S. 330, it was held that there was no basis for enjoining a strike at the behest of a railroad that had declined to negotiate, because of an erroneous view as to whether it was under a duty to negotiate concerning the subject matter involved in the dispute.

This Court finds no basis for holding that some of the provisions of the Norris-LaGuardia Act may be applicable while others may not be. This Court reaches the conclusion that no provision of the Norris-LaGuardia Act applies to an action or an application for an injunction against a strike of railroad employees if the defendants have failed to fulfill their obligations under the Railway Labor Act.

The conclusions reached by this Court in this opinion will be embodied in the final judgment to be entered after the trial of this action.

/s/ Alexander Holtzoff
United States District Judge.

March 3, 1966.

APPENDIX B

Opinion of the Court *

THE COURT: This action was brought by a large number of railroads against several organizations of railroad employees for the purpose of securing an adjudication as to reciprocal rights of the parties following the termination of the effective period of an award of a compulsory arbitration ordered by the Congress concerning two basic controversies between the employers and the employees, namely, the question whether firemen should be eliminated from diesel powered locomotives in freight and yard service, and whether the size of train crews or crew consist, as it is denominated in the parlance of the industry, may be reduced on various runs.

The award of the Special Arbitration Board created under the authority of Congress is known as Award 282.

Two basic issues of law involved in this case were heard and determined separately in advance of the trial. The remaining issues involving largely the application of these prior rulings to specific situations, then came on for trial. This opinion disposes of the remaining questions of fact and law.

The evidence was introduced at the trial in the form of a detailed stipulation of facts consisting of about 22 pages with numerous exhibits attached thereto.

Counsel are to be highly commended for their admirable cooperation and meticulous and sedulous labors in preparing the stipulation and for proceeding in this highly effective and professional manner.

Although this action was brought originally for a permanent injunction as well as a declaratory judgment, counsel for the plaintiffs indicated, after the Court

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* Transcript of Proceedings, March 28, 1966, pages 116-127.

announced its earlier ruling on the two basic questions on March 3rd, 1966, that the plaintiffs would not press for an injunction at this time but desired a declaratory judgment. Accordingly, this action then proceeded and will be determined as an action for a declaratory judgment.

We shall now take up the various problems presented and argued at the trial.

The rulings about to be made must be considered in the light of the previous underlying basic opinion of March 3rd, 1966, which is to be deemed incorporated by reference.

During the effective period of Award 282, which terminated so far as the defendants in this action are concerned on January 25th, 1966, numerous reductions in train crews were authorized, either by agreements or by Special Boards of Adjustments created under Article III of Award 282. About 90 such awards of Special Boards of Adjustments are listed in the stipulation.

In its opinion of March 3rd, 1966, this Court ruled that a new status was created as a result of these awards and that this status is to be maintained after the expiration of the effective period of Award 282 and may be changed only by agreement or by first serving 30-day notices under Section 6 of the Railway Labor Act and then pursuing step by step the remedies provided by that statute.

During the same period as has just been stated, a number of agreements have been made relating to the composition and size of train crews embodying a provision that they shall continue in effect to the same extent as if they were awards of Special Boards of Adjustment created pursuant to Article III, or Section III as it is sometimes called, of Award 282.

Accordingly, it is the opinion of the Court that the same consequences attach to these agreements as to the awards of Special Boards of Adjustment. The agreements create a new status which may not be altered except by agreement or in the manner prescribed by the Railway Labor Act, as has just been stated.

This ruling obviously likewise applies to similar agreements which include a provision that they shall continue in effect until changed in accordance with the provisions of the Railway Labor Act. This conclusion likewise governs those agreements which provide that they shall continue in effect until January 25th, 1966 and thereafter.

Some of the agreements are silent on the question as to how long they should continue in force. The same consequences attach to them. In other words, they also create a new status that may not be modified after the expiration of Award 282 except by further agreement or by invoking the remedies provided by the Railway Labor Act, as already indicated.

There are numerous agreements referring to Award 282 which are expressly made dependent, in one way or another, in their duration, on the effective period of the basic award. Irrespective of the precise phraseology employed in each instance, they must be deemed to have been executed in the light of and in contemplation of Award 282 and as having the same effect as awards of Special Boards of Adjustment created under that award. It follows, hence, that the same consequences attach to them as to the agreements already discussed.

This conclusion also extends to agreements containing such provisions as that the agreement "shall remain in effect until January 25, 1966, as provided by Section IV, Duration of Arbitration Award No. 282;" or "shall remain in effect only for the duration of award of Arbitra-

tion Board 282;" or that "neither party shall serve notices under the provisions of Arbitration Award No. 282 for any change in crew consists prior to January 25th, 1966;" or "an agreement in accordance with the terms of the award of Arbitration Board 282;" or "that this agreement shall remain in effect until January 25th, 1966, with the understanding that neither party shall serve notices under the provisions of Arbitration Award No. 282 for any change in crew consists prior to January 25th, 1966;" or "that this agreement will continue in effect in accordance with Section IV, Duration of Award of Arbitration Board 282."

It is clear that all of these agreements were adjusted to the duration of the effective period of Award 282, they were made in contemplation of that Award, and the reasonable construction of these agreements, in the opinion of the Court, is that they have the same effect as awards of the Special Boards of Adjustment created under the Award, and the same consequences attach, namely, that a new status is created which cannot be changed except in the manner already discussed.

It will be recalled that in practically every case the original controversy had its inception in notices served by carriers and counter-notices served by organizations of employees. There are a few cases, however, in which notices were served only by organizations of employees. The Court is of the opinion, however, that they too come within the purview of Award 282 and therefore the present ruling applies to them.

In *Division 700, Brotherhood of Locomotive Engineers* v. *National Railway Labor Arbitration Board 282,* 224 F. Supp. 366, the Court held that a carrier was not affected by Award 282 if neither the carrier nor any of the organizations of employees served any notices under the Railway Labor Act in respect to employees of that

carrier. This Court in the course of its opinion made the following observation on page 366:

> "What is obviously meant by the statute"—referring to the statute creating Board 282—"is that the notices of November 2nd, 1959"—meaning the carriers' notices—"or the notices of September 7th, 1960"—meaning the employees' notices—"should have been outstanding throughout the period of mediation in order that the compulsory arbitration proceeding should attach to the specific parties."

It will be observed that the Court remarked that in order that the award might be applicable it was necessary that either one of the two groups of notices should have been outstanding and not that both groups were required. To be sure, this observation is a dictum, but it expresses the view of this Court, and the Court now rules, that Award 282 applies in the case of any carrier as to which either one of the two sets of notices were outstanding.

The Southern Railway System is in a peculiar position. Its component parts were not parties to the proceedings before Arbitration Board 282 and as a result would not have been bound by its award. They entered into an agreement, however, with the Brotherhood of Railroad Trainmen on July 26th, 1965, reducing the size of various yard crews and crews on numerous branch lines. This agreement provided in Paragraph 5 that:

> "This agreement shall become effective July 26th, 1965 and shall contiue in effect until January 25th, 1966 and thereafter, to the same extent as if it were an award of a Special Board of Adjustment rendered in pursuance of Section III, consist of road and yard crews, of the Award of Arbitration Board No. 282."

The conclusion necessarily follows that the same consequences attach to this agreement as do to the agreements already discussed.

A different result must be reached in respect to three agreements which contain an express provision to the effect that upon their expiration the prior rule as to crew consist would again be in full force and effect. It is clear that in these instances the express intention of the parties was to preclude the creation of a new status, but to limit the reduction of size of crews to a specific period. In these cases the Court is of the opinion that the carriers are obligated to restore the crews to their pre-existing size. These crews may be reduced only by further agreement or by proceedings under the Railway Labor Act initiated by the service of notices under Section 6.

In some instances proceedings were pending but not completed before Special Boards of Adjustment when the effective period of Award 282 came to an end on January 25th, 1965. The question is presented whether these proceedings may continue subsequently to that date and final awards made later.

The problem is analogous to that which arises in the event of a repeal of a statute conferring jurisdiction on a court. Under such circumstances the court is not only deprived of authority to entertain future actions of the type covered by the jurisdictional act which has been repealed but also looses power to proceed in those cases covered by the act that were pending on the effective date of repeal. This principle was established in the historic case of *Ex Parte McCardle, 7 Wallace 506.* There are numerous other cases enunciating and applying the same principle. Among them are *Railroad Company* v. *Grant,* 98 U.S. 398; *Hallowell* v. *Commons,* 239 U.S. 506; *Brumer* v. *United States,* 343 U.S. 112. In *Railroad Company* v. *Grant,* Mr. Chief Justice Waite stated that:

> "It is well settled that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law."

Such a frustration is frequently prevented by the inclusion of an express saving or reservation clause in the legislation providing for repeal.

No such clause is found either in the Act providing for the creation of the Arbitration Board or in the Award of the Board. It is not unlikely that the Board was of the opinion that it was without power to include such a reservation or saving clause in its Award in view of the peremptory cutoff date contained in the statute.

The conclusion is inescapable that all proceedings pending before Special Boards of Adjustment came to an end on January 25th, 1966 and that no effective award could be made in any of them subsequently to that date.

The Court is not unmindful of the fact that underneath the prosaic questions of a somewhat technical nature, seemingly, upon which it has had to rule, there are human problems. The Court is not oblivious of the fact that there are many employees and their families who have suffered some hardship and possibly considerable hardship, it is to be hoped of a temporary nature. This unfortunate situation is part of a much larger picture. As a result of vast far-reaching technological improvements, inventions and discoveries coming along within a short period of time we have been going through a situation that is somewhat analogous and akin to the Industrial Revolution in England of 150 years ago, although not quite as intense in degree. The period of transition creates difficulties for individuals, without doubt.

Fortunately, we have developed a social consciousness that did not exist in England 150 years ago and many steps have been taken, effectively, to lighten the burden on individual employees and their families during the period of transition. For example, the government has

provided for unemployment compensation and other forms of social security. There are various agreements between labor unions and employers that tide employees over a critical period. Board 282 has made an outstanding and notable contribution in that field. Some hardships will remain, without a doubt. The Court is not unaware of that fact.

One of the problems is the fact that there are many employees who are unwilling to learn new skills or change occupations or are reluctant to change their homes. The old pioneer spirit seems to have been dampened. The quest for adventure that was exhibited by men and women who crossed the prairies in covered wagons seems to have been diminished to a large degree. The spirit of the immigrant who looked around and was willing to take any job to make a living does not seem to exist to the same extent.

However, we must realize that we are dealing with human beings that have all the frailities, as well as all the good characteristics, of humanity; we are not dealing with automatons.

The Court had all this in mind and it realizes that some of these rulings will necessarily cause some hardship. The Court is gratified, however, to be cognizant of the fact that the award of Board 282 has eliminated or reduced a great many hardships that otherwise might have followed.

The Court does not want to conclude this opinion without expressing a sense of gratification at the fact that although the representatives of the carriers and the representatives of the employees fought energetically and valiantly for the rights of the parties whom they represent, as it was their duty, they nevertheless did so

in a manner that was in due accord with the respect for the law and ethics and morals.

The stipulation of facts entered into by the parties, the opinion of this Court filed on March 3rd, 1966, and a transcript of the present decision, will together constitute the findings of fact and conclusions of law. Counsel may submit a judgment embodying the rulings made in these two opinions.

APPENDIX C

* * * *

Opinion of the Court *

THE COURT: In this action a preliminary determination has been had as to some of the basic questions of law in an opinion rendered by this Court on March 3rd. Then the issues as to all of the defendants except one were tried and determined by a subsequent opinion rendered by this Court on March 28th. The issues as to the defendant Order of Railway Conductors and Trainmen were severed by the Court on the application of the parties for separate disposition and they are before the Court at this time.

The parties have in a very commendable manner stipulated all the facts, and the Court adopts the stipulation of facts as its findings of fact and this opinion will constitute the conclusions of law.

There are two issues to be determined between the parties.

During the effective period of Award 282 the defendant served certain notices under Section 6 of the Railway Labor Act, 45 U. S. Code 156, proposing changes in what is called crew consist in the parlance of the railway industry or the size of train crews. The Court held in its opinion of March 28th that while these notices were not nullities, they were prematurely served and did not become effective until the day after the termination of the effective period of Award 282.

Immediately upon their becoming effective, it was the duty of both parties to proceed to conduct conferences, as provided in Section 6 of the Railway Labor Act, with the view to negotiating the dispute.

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* Transcript of Proceedings, April 19, 1966, pages 46-53.

It appears in this case that conferences have been had prior to the termination of the effective period of the Award between the parties. These conferences, however, consisted of a statement on the part of the carriers to the effect that the notices were prematurely served and were otherwise outside of the scope of the Act and therefore there was no obligation to negotiate. To be sure, at these conferences representatives of the employees attempted to discuss the merits of the dispute. Into this discussion, however, the representatives of the carriers declined to enter.

The Court is of the opinion that this is not a conference of the type required by the Railway Labor Act. Conferences required by the Act must involve negotiations concerning the merits of the dispute. There was no obligation to negotiate until after the termination of the effective period of the Award.

Under the Railway Labor Act, as it has been construed by the Supreme Court in *Virginian Railway* v. *Federation of Railway Employees*, 300 U.S. 515, it was held in a unanimous opinion rendered by Mr. Justice Stone, to which this Court adverted at length in its opinion of March 3rd, that there is a binding obligation on the part of both parties to conduct negotiations in good faith pursuant to notices served under Section 6 of the Railway Labor Act. The Supreme Court made it clear that the provision for negotiations was not merely an expression of a pious wish, was not hortatory, but was a command. At page 545 the Court stated:

> "It is, we think, not open to doubt that Congress intended that this requirement be mandatory upon the railroad employer and that its command in a proper case be enforced by the courts."

In that case it was the carrier who refused to negotiate, but the obligation is equally binding on both sides.

At page 548 Mr. Justice Stone states:

> "The statute does not undertake to compel agreement between the employer and employees, but it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences. In short, to enter into a negotiation for the settlement of labor disputes."

Reciprocally, I would say that there is an obligation on the part of the representatives of employees to meet and confer with authorized representatives of the employers and to make reasonable efforts to compose differences.

That requirement is not fulfilled by a meeting at which one side denies the obligation to negotiate. There must be a bona fide actual negotiation, and the courts will, by appropriate decrees, require negotiations.

Accordingly, the Court rules that it is the duty of both sides, through their representatives, to meet, confer and negotiate for the purpose of endeavoring to reach an agreement, if possible, and that such negotiations are the first step to be taken under the procedure prescribed by the Railway Labor Act.

The Court further holds that the meetings held at which one side declined to negotiate the merits of the dispute because it was under no obligation to do so, is not sufficient compliance with the Act.

This discussion disposes of the first issue to be determined at this hearing.

The second and final issue is whether either party may, prior to the termination of the negotiations, apply to the National Mediation Board for their services. That question too is governed by Section 6 of the Railway

Labor Act. It provides, in effect, that after the service of notices under Section 6 conferences are to be held between the parties and also that application may be made to the National Mediation Board for its services.

Section 155 of Title 45, being Section 5 of the Railway Labor Act, provides that either employees or a carrier may invoke the services of the Mediation Board in connection with a dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference. In other words, it is contemplated that conferences should take place first and an attempt should be made to reach an adjustment.

Whether conferences must be exhausted or whether in the course of the conferences application may be made to the Mediation Board is a matter concerning which the statute seems to be silent. It seems to the Court that it is the National Mediation Board that must first exercise its discretion in determining at what point in the negotiations it will accept an offer or comply with a request for its services. Whether it should wait until all of the negotiations are exhausted or whether it should step in during the progress of the negotiations if requested, it seems to the Court is a matter for the discretion of the National Mediation Board.

The Court has in mind the general basic principle that the judiciary will not interfere with proceedings pending in administrative agencies until after the proceeding has terminated. In this connection the Court refers to its decisions in *Southern Pacific Co.* v. *National Mediation Board,* 223 F. Supp. 951, and *International Brotherhood of Teamsters etc.* v. *Brotherhood of Railway Steamship Clerks,.* 245 F. Supp. 835, which was affirmed by the Court of Appeals on March 22nd of this year.

In other words, the Court reaches the conclusion that it is not for this Court to determine at what point the

National Mediation Board may step into the dispute, whether during the progress of the negotiations or only after the negotiations are completed. That is a matter for the National Mediation Board.

The Court does reach the conclusion, however, that recourse to the National Mediation Board may be had only after notices under Section 6 become effective, which in this case was the day after the termination of the effective period of the Award.

In conclusion the Court wants to state emphatically that under the Railway Labor Act there may be no recourse to self-help until each of the procedural steps provided by the statute are exhausted successively, and the conferences and mediation are only the first two steps, there are others prescribed.

Counsel may submit a proposed judgment embodying these two rulings.

* * * *

APPENDIX D

Opinion of the Court *

THE COURT: The present motion is, in effect, an application at the foot of the decree. In the opinion of the Court the relief which the Court will grant is a proper relief to be granted at the foot of the decree, even though the motion itself possibly, as originally framed, seeks relief beyond such a scope.

The relief requested is in the form of a declaratory adjudication or judgment. The Court is of the opinion that there is a justiciable controversy justifying such relief.

The basic question presented to the Court is whether conferences should be held pursuant to Section 6 of the Railway Labor Act on the basis of notices served by the carriers, who are making the present motion, on the defendant brotherhood, and by the latter on the carriers. Some conferences have indeed taken place. The conferences have been abortive. Each side blames the other for the fact that the conferences were frustrated.

The Court is of the opinion that no useful purpose would be served by determining whose fault it was that in any particular instance a bona fide conference on the merits of the dispute has not taken place.

The fact remains that the Railway Labor Act, by Section 6 thereof, 45 United States Code 156, contemplates that there should be a full-fledged conference on the merits of the dispute after the service of notices.

The Court has previously held that although the notices served prior to the expiration date of the Award were not nullities, they did not actually become effective until after the expiration of the Award and no steps had to be taken thereunder.

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* Transcript of Proceedings, May 19, 1967, pages 71-74.

There is a public interest involved here and irrespective of who is to blame for the abortive character of the attempts to hold conferences, the Court holds that conferences must be held at this time. It bases its decision on the ruling of the Supreme Court in *Virginian Railway Co.* v. *System Federation No. 40,* 300 U.S. 515, in which the Supreme Court held that although the courts cannot compel parties to agree, they may and will compel them to negotiate under Section 6 of the Railway Labor Act. Naturally, such a negotiation must be a full-fledged negotiation on the merits of the dispute.

There is another branch of this motion and that is an adjudication as to the rights or duties of the brotherhood in respect to the National Mediation Board. The Court is of the opinion that it should not interfere, either directly or indirectly, with the National Mediation Board. *Switchmens Union of North America* v. *National Mediation Board,* 320 U.S. 297; *Southern Pacific Co.* v. *National Mediation Board,* 223 F. Supp. 951; *International Brotherhood of Teamsters* v. *Brotherhood of Railway & Steamship Clerks,* 245 F. Supp. 835, which was affirmed by the Court of Appeals on March 22nd, 1966.

However, it cannot be said that the remedies under the Railway Labor Act will have been exhausted until and unless conferences are held under the notices, and the Court reaches the conclusion that the attempts to hold such conferences so far have not complied with the spirit or the letter of the Railway Labor Act.

The Court further holds that there can be no resort to self-help on either side until every step—first, conferences, and then the other steps prescribed by the Railway Labor Act—are concluded. In other words, the carriers may not put their notices in effect unilaterally and the employees may not resort to a strike.

So far as mediation proceedings are concerned, the Court will not interfere with the National Mediation Board. It may well be that the National Mediation Board, in the exercise of its discretion, will postpone further steps until after conferences have been held as indicated in this opinion, but the Court will not interfere by any order or adjudication with the activities of the National Mediation Board, directly or indirectly.

You may submit an appropriate order in conformity with this decision.

APPENDIX E

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Appeals from the United States District Court for the District of Columbia

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Decided May 12, 1967

Mr. Milton Kramer was on the brief for appellants in Nos. 20,152, 20,229 and 20,249 and appellees in No. 20,172.

Mr. James D. Hill for appellant in No. 20,158 and appellee in No. 20,191.

Mr. Joseph L. Rauh, Jr., with whom *Messrs. John Silard, Daniel H. Pollitt, Isaac N. Groner, David Epstein* and *Stephen E. Moss*, were on the brief for appellant in Nos. 20,192 and 20,193 and appellee in Nos. 20,215 and 20,216.

Mr. Francis M. Shea, with whom *Mr. Richard T. Conway* was on the brief for appellants in Nos. 20,172, 20,191, 20,215 and 20,216 and appellees in Nos. 20,152, 20,158, 20,192, 20,193, 20,229 and 20,249. *Messrs. David Booth Beers* and *Ralph J. Moore, Jr.*, also entered appearances for appellants in Nos. 20,215 and 20,216.

Before DANAHER, *Circuit Judge*, BASTIAN, *Senior Circuit Judge*, and LEVENTHAL, *Circuit Judge*.

LEVENTHAL, *Circuit Judge*:* This opinion deals with a number of appeals and cross-appeals in the railroad work rules litigation.

It may help if at the outset we indicate generally the nature of our views, though their precise exposition and the complexity of the issues require a long opinion. Part I of this opinion reviews the history of the passage by

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* As amended by Order of July 18, 1967.

Congress in 1963 of a law providing for compulsory arbitration of the work rules controversy with an Award of two years duration. In Part II we approve the conclusion of the District Court that the work rules in effect following the expiration of the Award in 1966 did not revert to the 1963 condition and that the new plateau of work rules, established for early 1966 by the Award, continued in effect unless changed in accordance with the Railway Labor Act. In Part III, reversing a ruling of the District Court, we hold that even prior to the expiration of the Award the carriers had a statutory duty to respond to notices of the unions and begin collective bargaining about the rules to become effective following the expiration of the Award. In Part IV we conclude, reversing the District Court, that the railroad companies violated their duty to bargain with the Firemen, on the notice relating to prospective work rules, and with the Trainmen. We affirm other aspects of the decree, albeit for reasons somewhat different from those of the District Court, since we conclude that the railroads had no statutory duty to bargain over either another notice served by the Firemen, which sought to undermine rights vested under the Award, or the early notice served by the Conductors.

I

Understanding of the issues will be aided by a historical review of the problem.

The phenomenal growth of railroads in the 19th century was accompanied by evolution of complementary employee organizations. Railroad workers were among the first to organize unions to present employee demands collectively. The Order of Railway Conductors was founded in 1868, the Brotherhood of Railroad Firemen and Enginemen in 1873, and the Brotherhood of Railroad Trainmen in 1883. Labor relations in the railroad sphere

has been the subject of Congressional enactments, and is now governed essentially by the Railway Labor Act.[1]

The last hundred years have also witnessed the evolution of an elaborate "common law" embracing the relations of railroad management and labor. There exists a roughly defined system that is the product of long-established practices and understandings, collective bargaining agreements, court decisions and administrative orders. The system covers among other things the manning of trains and the assignment of tasks to employees. These principles and patterns of behavior are collectively denominated "work rules."[2] As the Supreme Court has aptly put it, the railroad industry with its complex of regulations is virtually a "state within a state."[3]

Work rules concerning firemen date from the early days of the industry. Their initial chore was to select and load fuel into the wood-burning locomotive. The appearance in the late 1920's of the diesel engine spawned the problems that beset the industry to this day. The carriers consistently contended that the former loaders of wood were now merely dead wood. Yet beginning in 1933 the Brotherhood of Locomotive Firemen and Enginemen (hereafter BLFE) negotiated individual agreements with various carriers to preserve the continued status of firemen-helpers. The BLFE in 1937 joined with substantially all United States carriers in signing the National Diesel Agreement, providing for the employment of fire-

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[1] 45 U.S.C. §§ 151-63 (1964), as amended, 45 U.S.C. § 153 (Supp. II, 1966).

[2] *See generally* Comment, *The Railway Work Rules Dispute—A Precedent for Compulsory Arbitration*, 14 DE PAUL L. REV. 115 (1964).

[3] *See* Whitehouse v. Illinois Cent. R.R., 349 U.S. 366, 371 (1955), quoted by Fortas, J., dissenting in Transportation-Communication Employees Union v. Union Pac. R.R., 385 U.S. 157, 176 n.5 (1966).

men-helpers on practically all diesel powered locomotives. Similar terms endured in subsequent contracts, including the Diesel Agreement of 1950.

While work rules retaining positions for firemen became thus established, the industry's quest for modernization resulted in almost one hundred percent diesel operation. In 1956 the carriers gave hint that intense competition from other modes of transport and the resulting financial pressure would no longer permit preservation of the ancient status. During negotiations on their proposal to give management the discretion to determine the employment of firemen the carriers withdrew this plan by agreeing to a three-year moratorium on such changes in work rules. But the die had been cast, and the carriers argued that the verdict of history and technology had come in, pronouncing railroad firemen extraneous members of a train crew. So too, they asserted, advanced technology and innovations would permit sharp reductions in the level of what is called the "crew consist," specifically the number of brakemen needed for the safe operation of the train.

It is against the backdrop of the always "sensitive and touchy problem"[4] of overmanning and efforts to overcome it that we focus on the events more immediately leading up to these appeals. In 1959 the carriers served notices under Section 6 of the Railway Labor Act,[5] pro-

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[4] Brotherhood of Locomotive Engineers v. Chicago, Rock I. & Pac. R.R., 382 U.S. 423, 430 (1966).

[5] 45 U.S.C. § 156 (1964): Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have

posing the elimination of firemen from freight and yard service, and the abrogation of regulations fixing the size of train crews. The following year, 1960, the unions served a series of counter-proposals directed at continuing and even extending the use of firemen and at setting the crew consist level at not less than one conductor and two brakemen plus such additional trainmen as the assurance of maximum safety demanded.

Shortly thereafter, in an effort to aid in the adjustment of this dispute, President Eisenhower appointed a special Presidential Railroad Commission to study the various facets of the problem. This Commission issued its report and recommendations in 1962. In general the carriers accepted the findings, but the unions balked.

Meanwhile, the lengthy procedures contemplated and mandated by the Railway Labor Act continued. Negotiations and mediation failed to bridge the gulf between the parties. The atmosphere of crisis heightened, for the Supreme Court ruled in March of 1963 that all the tools of the Act prescribed for the parties had been tried and found inadequate, and they were thus free to resort to self-help: that is, the unions could lawfully strike, or the carriers could unilaterally impose the new rules.[6]

The last device in the statutory arsenal was invoked. Acting under Section 10 of the Railway Labor Act, 45 U.S.C. § 160, the President, on a finding by the National Mediation Board of the threat of deprivation of

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been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

[6] Brotherhood of Locomotive Engineers v. Baltimore & O.R.R., 372 U.S. 284, 290-91 (1963).

essential transportation services, convened an Emergency Board to make a prompt investigation and report. For thirty days following the rendition of such a report no party may take unilateral action. The investigation was made and the report was filed.

Once again the unions proved unwilling to accede to the recommendations of others. During July of 1963 a flurry of tense negotiations was spurred by the active intervention of President Kennedy and the participation of Secretary of Labor Wirtz. The unions rejected the President's proffer of the services of Justice Arthur Goldberg as arbitrator of the dispute. For a fleeting period it appeared that voluntary arbitration would provide the answer, but though the parties indicated willingness in principle they could not get together in the procedural particulars of arbitration.

A strike was imminent. The country was faced with a serious emergency. No outstanding techniques remained to move the antagonists to a responsible accord. Only Congress could avert a national catastrophe, and it was to Congress that President Kennedy turned for unprecedented measures.[7] The Administration proposal, submitted July 22, 1963,[8] would have authorized the Interstate Commerce Commission to serve, in effect, as the agency for compulsory settlement of the threat by empowering it to put into effect, on the application of the parties, any of the changes proposed in the notices of 1959 and 1960 with such modification as it found appropriate in reconciling the private and public interest. That resolution made it clear that these were to be only interim work rules to be effective until the parties themselves

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[7] *See Message from the President of the United States Relative to Railroad-Labor Dispute*, H.R. Doc. No. 142, 88th Cong., 1st Sess. (1963).

[8] S. J. Res. 102, 88th Cong., 1st Sess. (1963).

agreed on more permanent terms, but in no event to last for more than two years.

The law that was actually passed differed in various particulars from the Administration measure. The "one significant change" [9] made was the substitution of an independent *ad hoc* board of arbitration for the Interstate Commerce Commission, principally for the reason that Congress wanted to emphasize the peculiar and non-precedential nature of its emergency intervention. By August 28, 1963, this unique compulsory arbitration law, Public Law 88-108, had passed both Houses of Congress and received presidential approval. We set out this statute in an appendix to this opinion.

Public Law 88-108 expressly forbade any unilateral self-help by the parties who had served or received the notices of 1959 and 1960. It created a Board of Arbitration (since designated Board 282), to be composed of seven members, two each representing the carriers and unions, and the other three to be selected by the President if, as happened, the parties could not agree even on mutually acceptable neutral members. The Board was ordered to pass on the two focal issues of the use of firemen and the size and composition of train crews. The Award (since designated Award 282) was to "be binding on both the carrier and organization parties to the dispute and . . . constitute a complete and final disposition of the aforesaid issues. . . ." (Section 3). The effective date of the Award was set at sixty days after filing in the United States District Court for the District of Columbia. According to Section 4 the Award was to "continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree other-

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[9] Brotherhood of Locomotive Engineers v. Chicago, Rock I. & Pac. R.R., *supra* note 4, 382 U.S. at 432.

wise."[10] It is this provision specifying the maximum mandatory duration that has sparked the issues we are now required to judge.

The Board met, held hearings, took evidence. It issued an Award that provided: "This Award shall continue in force for two years from the date it takes effect, unless the parties agree otherwise." An important extension agreement is that of the carriers and BLFE, which extended the termination date to March 30, 1966. Except for such agreement the Award expired at the close of the two year period on January 24, 1966.[11]

Award 282 held that the nearly two hundred carriers involved could eliminate ninety percent of the firemen positions, and set forth a procedure for dismissal and attrition. It was a staggering blow to the BLFE. The

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[10] The measure was somewhat analogous to the legislative intervention in a 1916 rail dispute when Congress decreed that eight hours was to be the measure for a standard day in determining compensation, and forbade reduction in the standard day's wage until thirty days after findings were announced by a special commission created to study this system, to report back in six-to-nine months. The Supreme Court upheld this statute, characterizing it as a form of compulsory arbitration that was "limited" to a "reasonable period" fixed by the statute. *See* Wilson v. New, 243 U.S. 332, 345, 346, 351 (1917); *Message from the President, supra* note 7, at 4-5; S. Rep. No. 459, 88th Cong., 1st Sess. 8 (1963).

[11] The parties and the District Court have all accepted and implemented the Award as effective January 25, 1964. With that date marking the first day of the two-year period it is clear that the full two-year period expired at the end of January 24, 1966. We see no valid basis for the assumption of the District Judge that the Award was in existence on January 25, 1966. It may be regrettable, but we consider the Award rendered on January 25, 1966, by a special board of adjustment with respect to a dispute between BRT and the Green Bay & Western Railroad Co. and Kewanee, Green Bay & Western Railroad Co. to be without legal significance, unless it has been adopted by agreement of the parties, a question not before us.

Award did not, however, authorize a single spasmodic discharge of thousands of firemen. Indeed, in some aspects it was "highly favorable to the employees," *see In re Certain Carriers, Etc.*, 229 F. Supp. 259, 261 (D.D.C. 1964). Thus the Award guaranteed permanent employment for life, or until retirement or resignation, for every fireman who had been in active service for more than ten years, with a comparable job insured for all with service of two years or more. Those firemen with less than two years seniority were accorded severance allowances, amounting in some cases to six months pay. Under the terms of this Award the carriers have pruned eighteen thousand firemen from their ranks, paid out some $36,000,000 in separation benefits, and provided comparable jobs to twelve hundred former firemen.

On the crew consist issue, the Board determined that a single national standard would be inappropriate. It ruled that no change in crew consist be made except pursuant to the Award. Then it provided that where existing work rules required more or less than two trainmen, any party might give notice of a proposed change. If after conferences were held by the local properties no agreement was forthcoming, the issue could be referred to a special board of adjustment created at the local level. The Award articulated a series of "guidelines" to be followed by these special boards in resolving particular disputes. Many crew consist agreements and special awards were made under this procedure.

Pursuant to Section 9 of the Railway Labor Act, 45 U.S.C. § 159 (1964), as incorporated by reference in Section 4 of Public Law 88-108, the unions sued in the District Court for the District of Columbia to impeach the Award. The attack was two-pronged. First, they contended that the statute authorizing compulsory arbitration in this context was unconstitutional as beyond the power of Congress, or in the alternative as delegating power

to an administrative body without adequate specificity of standards. Second, the unions argued that the Award did not conform to the statute under which it claimed vitality. The District Court rejected both challenges, and both approved the statute and confirmed the Award. *Brotherhood of Locomotive Firemen* v. *Chicago, B. & Q. R.R.*, 225 F.Supp. 11 (D.D.C. 1964). This court affirmed,[12] 118 U.S.App.D.C. 100, 331 F.2d 1020, and the Supreme Court denied certiorari, 377 U.S. 918 (1964).

In subsequent months there poured into the courts, here and elsewhere, a number of actions, some brought by unions and some by railroads, presenting a plethora of particular problems,[13] but these skirmishes need not detain us. What is critical to the situation now before us is this. Instead of using the two-year period specified by Congress and the Award to continue meaningful negotiations looking toward long range adjustments of the various vexing problems, guided by the experience gleaned from functioning under the Award's interim rules, the parties apparently focused on whether the expiration of the Award would leave them in a better position than they might achieve by return to the collective bargaining table, where some concessions might have to be made.

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[12] One judge dissented on the ground that the constitutional issues should have been referred to a three-judge district court.

[13] These actions were largely concerned with the proper construction of the statute or award in regard to individual fact situations. *See, e.g.*, Brotherhood of Railroad Trainmen v. Certain Carriers, Etc., 121 U.S.App.D.C. 230, 349 F.2d 207 (1965); Brotherhood of Railroad Trainmen v. Chicago, M., St. P. & Pac. R.R., 120 U.S.App.D.C. 295, 345 F.2d 985 (1965); Atchison, T. & S.F.Ry. v. Brotherhood of Railroad Trainmen, 324 F.2d 899 (7th Cir. 1963); In re Certain Carriers, Etc., 231 F.Supp. 519 (D.D.C. 1964); Brotherhood of Railroad Trainmen v. Missouri Pac.R.R., 230 F.Supp. 197 (E.D.Mo. 1964); In re Certain Carriers, Etc., 229 F.Supp. 259 (D.D.C. 1964).

The positions adopted by the parties, distilled to their essentials, were as follows: The Unions believed that upon expiration of Award 282, authorized by Congress as a "final" settlement for a period "not to exceed two years," it would have no continuing significance. They assumed that immediately upon the expiration of the Award the status quo ante would revive and the National Diesel Agreements would once more control. This position was shared by the other unions who presumed the prior crew consist rules would return from a two year consignment to limbo. But as a hedge the unions also, during the effective period of the Award, served notices proposing in substance that on termination of the Award there would come into effect rules that were substantially similar to the old work rules, with relatively minor adjustments.

Not surprisingly, the carriers took a different view. As they saw it, the status created by Award 282 had an enduring quality that transcended the formal effective period of that Award. But they too, "just in case," served counter-proposals on the unions to preserve the benefits the Award had carved for them. As will appear in greater detail, the carriers declined to discuss the merits of any of these notices at the few conferences that were held prior to the termination of the Award, reasoning that although Public Law 88-108 and the Award permitted bargaining during that period they nevertheless stopped short of imposing a legal duty to do so. These are the two central questions of these appeals: What rules were in force the day after Award 282 expired? What was the duty of the parties to bargain about changing those rules, and when did it arise?

These appeals reach us from the orders disposing of suits and counter-suits seeking declaratory and injunctive relief, brought by the carriers and by the Brotherhood of Locomotive Firemen and Enginemen (BLFE), the Broth-

erhood of Railroad Trainmen (BRT), and Switchmen's Union of North American (SUNA), and the Order of Railway Conductors and Brakemen (ORCB). *See generally Bangor & A.R.R.* v. *Brotherhood of Locomotive Firemen,* 253 F.Supp. 682 (D.D.C. 1966) (Nos. 20192, 20193, 20215, and 20216); *Akron & B. Belt R.R.* v. *Brotherhood of Railroad Trainmen,* 250 F.Supp. 691, 252 F.Supp. 207 (D.D.C. 1966) (Nos. 20152, 20172), *supplemented,* 254 F. Supp. 306 (D.D.C. 1966) (Nos. 20229, and 20249); *Akron & B. Belt R.R.* v. *Order of Railway Conductors,* 253 F. Supp. 538 (D.D.C. 1966) (Nos. 20158 and 20191).[14]

II

In advance of the trial of these cases, the parties consented to the preliminary adjudication of the effect of the expiration of Award 282. In a guideline opinion underlying subsequent rulings, the District Court held that, even though the Award formally terminated, it had created a "new plateau" of work rules, which were to continue in force until changed pursuant to the regular procedures of the Railway Labor Act.[15] See *Akron & B. Belt R.R.* v. *Brotherhood of Railroad Trainmen,* 250 F. Supp. 691, 695-97 (D.D.C. 1966).

The BLFE argues that the intention of Congress in giving the Award a limited 2-year life was to deny it any further legal effect, to leave the parties as if the award had never been in existence, and to restore the

[14] Appeal No. 20316, Brotherhood of Locomotive Firemen (and H. E. Gilbert) v. Bangor & A.R.R., arises from an adjudication of contempt for violating a temporary restraining order. Although it was argued together with these cases, it presents different questions and is being considered separately. *See* Bangor & A.R.R. v. Brotherhood of Locomotive Firemen, 255 F.Supp. 476 (D.D.C. 1966).

[15] *Compare* Manning v. American Airlines, Inc., 329 F.2d 32, 34 (2d Cir.), *cert. denied,* 379 U.S. 817 (1964). *See also* Manning v. American Airlines, Inc., 221 F.Supp. 301 (S.D. N.Y. 1963).

status quo ante with the result that the day after the Award expired the work rules in effect were the same as those in effect when the statutes was passed. This approach has a kind of formal logic, and certain provisions of Public Law 88-108 could be read this way. Our approach in ascertaining "legislative intent" is hampered by the fact that the possibility that by the end of the formal duration of the Award the parties might not have agreed on anything to take its place is a subject on which the legislative history is, to use Justice Harlan's phrase, "essentially negative, which shows with fair conclusiveness only that Congress was not squarely faced with the problem this case presents."[16] In our case there is the added consideration that Congress was undoubtedly aware of the problem but apparently thought wisdom lay in avoidance of express delineation.

We think the mere limitation of the effective period of the Award neither implies nor compels the construction the unions seek. Our ruling is that the work rules created by the Award constituted a new plateau that was not automatically eroded when the Award expired. The legal underpinning for our ruling is not the Joint Resolution, which expired after 180 days of life—except insofar as necessary to sanction the Award. The ruling is not based on the Award, which had only a 2-year life, or on any agreement of the parties. The predicate of our ruling is, simply, the force of the Railway Labor Act. Certain work rules were in force on January 24, 1966 (or March 30, 1966, in the case of the BLFE). The mandate of the Railway Labor Act requires that the work rules in effect on any particular day shall also be in effect the following day—beyond the power of either party to institute a unilateral modification—subject to change only in accordance with the procedures prescribed by the Act. These pro-

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[16] *National Woodwork Mfrs. Ass'n* v. *NLRB*, —— U.S. ——, ——, 35 U.S.L.W. 4349, 4360 (U.S. April 17, 1967).

cedures begin with the notices required by Section 6 to be served by any party seeking a change at least thirty days in advance of the proposed effective date of such change. This new-plateau reasoning applies even though the work rules are established by agreements of limited duration. "The effect of § 6 is to prolong agreements subject to its provisions regardless of what they say as to termination."[17] It likewise applies even though the work rules are established by an arbitration award of limited duration.

This by no means suggests that there is no legal significance in establishing an award or agreement as one of limited duration. The limited duration has the obvious significance that work rules can be changed for the post-expiration period. The work rules can be changed, however, only by compliance with the provisions of the Railway Labor Act prescribing how changes in work rules are to be effectuated.

What we are in effect holding is that since Public Law 88-108 is silent as to the applicable legal rule, the case is governed by the combination of undeniable physical facts plus the general legal rule of the Railway Labor Act. The BLFE is constrained to find superseding intention in Public Law 88-108 which would in effect obliterate not only the Award as a document with legal effect but also the physical facts that came into being during the 2-year period. We think its construction of Public Law 88-108 would be unreasonable and inconsistent with the purposes and context of the legislation. It must have been reasonably contemplated that the Board of Arbitration might order deflation of the scope of existing overmanning. And it seems obvious that an automatic rescinding of any such pruning at the instant the Award was to terminate would spark the most unsettling havoc. To

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[17] Manning v. American Airlines, Inc., *supra* note 15, 329 F.2d at 34.

reach this result would necessarily mean trying to recreate a practically unrecoverable situation and sweeping away a host of rights that had already vested concomitant with the award, made final under the Act, permitting reductions in the work force. Such a view would also wipe out the supposedly permanent guaranty of employment for those thousands of employees whose seniority, the Award decreed, entitled them to lifetime protections.

III

We turn now to the question to what extent and by what procedure the parties could and did lawfully invoke the machinery prescribed by the Railway Labor Act in order to change the work rules in effect on the railroads at the expiration of the Award, rules that had been prescribed by the Board (including the crew consist rules prescribed by various local boards).

As already stated, these work rules were not immutable. Congress had enacted a compulsory arbitration measure of limited duration. The appropriateness of a limited duration for a compulsory arbitration measure, articulated by the Supreme Court 50 years ago in *Wilson* v. *New*, had been emphasized by the President and Congress.[18]

When were the parties to bargain about possible changes in the work rules that survived the Award? All parties agree that negotiation during the pendency of Award 282 was permissible, but the carriers say it was not obligatory. In our opinion, however, bargaining during the pendency of the Award 282 was not merely a matter for the whim of the parties but was to be governed by provisions of the Railway Labor Act, and these provisions remained in effect during the life of the Award for purposes of regulating the responsibilities of the parties to

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[18] *See* note 10 *supra*.

bargain concerning changes proposed to become effective *after* the expiration of the Award.

The principles and objectives underlying Public Law 88-108 reveal that Congress placed a high premium on the opportunity for continued collective bargaining during the life of the Award, in the hope and expectation, apparently shared at that time by the parties themselves, that the unions and carriers would themselves work out a long range solution to these sensitive problems by the traditional devices of collective bargaining. This special statute served to give the Nation a temporary respite from the threat of a disastrous national rail strike by forbidding for two years any unilateral changes or resort to self-help and imposing instead interim rules to cover the situation. But as we have seen, both the statute and the Award expressly contemplated that the parties were free to alter or extend the rules fixed by Award.[19]

Public Law 88-108 established a procedure for formulating rules to govern for up to two years, in the absence of a negotiated pact. This did not displace the otherwise applicable provisions of the Railway Labor Act on the duty to bargain on changes proposed to become effective subsequent to the two-year period. President Kennedy in his message to Congress expressed the desire that the parties continue to confer on the ultimate resolution of their disputes.[20] A chief spokesman for the carriers, Mr. J. E. Wolfe,[21] assured the Senate Committee that the car-

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[19] Indeed, on the crew consist issue, Section III.A(1) of the Award, remanded the dispute to local properties "for negotiation", and only if these further efforts to reach a settlement proved pointless were special boards of adjustment to be convened to fix the temporary rules.

[20] *See Message from the President, supra* note 7, at 6-8.

[21] Chairman of the National Railway Labor Conference, an organization whose members conduct about ninety percent of all railway operations in the United States.

riers understood that the Administration's bill "imposes a duty on the parties to attempt to settle their differences" and would "protect the public interest as a result of the establishment of these interim rules for a period of 2 years or less while the parties undertake, through collective bargaining, to bring about a more permanent solution of the problems." [22] We are aware that in the reshaping of the measure the duty to bargain on the work rules was not expressly spelled out, but the plan was surely retained. Indeed the preambles of both measures expressly and unequivocally proclaimed the care taken to select a system which solved the immediate emergency "in a manner which preserves and prefers solutions reached through collective bargaining." Changes were made by the Congress—notably the substitution of an independent *ad hoc* board for the Interstate Commerce Commission as the arbiter for the dispute.[23] There was not a breath of a suggestion, however, that Congress intended to remove or even downgrade the policy that the parties themselves should confer in order to reach long-range solutions through collective bargaining and agreement.

The carriers contend that all this means only that the parties were free to bargain during the Award if they wished, or even that they were encouraged to do so, but that for the two-year period the special act repealed pro tanto and by implication the duty under the Railway Labor Act to confer on proposed rule changes. We disagree. In our view Public Law 88-108 was intended to work the minimum disruption of permanent railroad legislation and normal collective bargaining. The only disruption wrought, the only "repeal by implication", was that

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[22] *Hearings on S.J.Res. 102, Before the Senate Comm. on Commerce,* 88th Cong., 1st Sess., ser. 24, at 375 (1963).

[23] The Supreme Court referred to this substitution as the only "significant change" from the Administration bill. Brotherhood of Locomotive Engineers v. Chicago, Rock I. & Pac. R.R., *supra* note 4, 382 U.S. at 432.

which necessarily accompanied the objective of staving off a cataclysmic strike by imposing a temporary settlement. We detect no glimmer of an intimation that the carriers were authorized to regard this as a two year hiatus in their obligation to bargain. Rather, we find much to militate against such a construction.

It is notable that the parties to this dispute had already agreed to submit their controversy to arbitration. They stumbled over procedural details. Congress viewed its role primarily as draftsmen of the specifics of an arbitration agreement to which the carriers and unions had already agreed in principle.[24] The statute in Section 4, the Award in Part IV, and the reports of both congressional committees carefully specified that the effective duration of the Award was limited to no more than two years, unless extended by stipulation, in order to restrict the "scope and impact" of the statute.[25]

In essence then we have a mechanism tantamount to an arbitration agreement, albeit one drafted by Congress, that confers on the arbitrator the power to impose a settlement binding for up to two years. It becomes appropriate, then, to consider what would have been the rights and duties of the parties if they had themselves written the arbitration agreement. We are not concerned here with customary adjudicatory or grievance arbitration. Although so-called "legislative" arbitration agreements are relatively infrequent they are not unknown. Under such agreements, prospective rules and working condi-

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[24] *See* S. Rep. No. 459, 88th Cong., 1st Sess. 9 (1963); H.R. Rep. No. 713, 88th Cong., 1st Sess. 12-13 (1963); Brotherhood of Locomotive Firemen v. Chicago, B. & Q. R.R., 225 F.Supp. 11, 18 (D.D.C.), *aff'd*, 118 U.S.App.D.C. 100, 331 F.2d 1020, *cert. denied*, 377 U.S. 918 (1964).

[25] S. Rep. No. 459, 88th Cong., 1st Sess. 10 (1963); *see* H.R. Rep. No. 713, 88th Cong., 1st Sess. 14-15 (1963).

tions, instead of being determined by agreement of the union and employer, as is customary, are determined by an arbitrator to whom the function is delegated.[26] Such a determination by arbitration is equivalent to a determination by agreement insofar as the rights and duties of the parties concerning future modification are concerned. An arbitration award does not operate to "prevent the [parties] from seeking through negotiations under the procedures provided for by the Railway Labor Act or otherwise a new agreement . . . covering the rules. . . ." [27]

Responsible conduct of the process of collective bargaining, for consideration of proposals to modify work rules established by an agreement or award of limited duration, embraces conference and consultation prior to the termination date. This is the way responsible businessmen deal with each other when they plan to continue a business relationship—for example, in negotiating on a contract or lease before its expiration date. This is the way responsible employers and unions implement the collective bargaining process, and respond to calls for change. And this is the way railroads and railroad unions must respond under the mandate of the Railway Labor Act.

The purpose of a Section 6 notice is "to fix a procedure for the commencement of conferences between representatives of the two parties if changes are to be made in the contract." [28] No rigid form for these notices is defined in the statute.[29] All that is specified is thirty days

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[26] *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 30-47 (rev. ed. 1960).

[27] Sheehy, Ch.J., in Brotherhood of Railroad Trainmen v. St. Louis Sw. Ry., 220 F.Supp. 319, 326 (E.D. Tex. 1963).

[28] McMullans v. Kansas, O. & G. Ry., 229 F.2d 50, 56 (10th Cir.), *cert. denied*, 351 U.S. 918 (1956).

[29] *See* Detroit & T.S.L.R.R. v. Brotherhood of Locomotive Firemen, 357 F.2d 152, 153 (6th Cir. 1966).

written notice of a proposed change. The Act requires that within ten days a time and place for conference be set, and that the first conference be held within the 30-day period.

To recapitulate, the Railway Labor Act not only requires railway employers and unions to confer and bargain on work rules established by agreements or awards having a fixed expiration date when one party wants to change the rules, but permits the statutory machinery to be invoked *prior* to expiration in order to seek an agreement on changes to become effective on or after expiration.

If an agreement (or award) contains a fixed expiration date, rather than the common indefinite or automatic self-renewal term, then the notice must indicate a proposed effective date for changes that is not only at least thirty days after the notice, but also a time after the outstanding agreement or award expires. Nothing in the Railway Labor Act, or the scheme of Public Law 88-108, forbids service of a notice more than thirty days before the suggested rules would or could be effective, and nothing relieves the recipient from the duty to commence bargaining at that earlier stage.

The carriers seek to buttress their claim of pro tanto repeal by implication by arguing that it can hardly be supposed that Congress intended to permit the unions to ready themselves to strike on January 25, 1966. The only forecast of that day we can find in the legislative history is the assumption that it would be preceded by an agreement of the parties. And that in turn, in our view, assumes that responsible collective bargaining would have been in train some time prior to the expiration date. If we turn from speculation about legislative intent to the realities of the Railway Labor Act, we are aware that the conferences triggered by Section 6 notices are typically the

beginning and not the end of the statutory procedures. If conferences proposed by a Section 6 notice are unavailing, either party can invoke the services of the National Mediation Board. While negotiations continue or the Board has jurisdiction, no self-help is permitted. The parties are free to submit their controversy to arbitration. If none of these techniques resolves the matter, the President may convene an emergency board to investigate the dispute and report back on the issues. Only when all these steps have been exhausted are the parties permitted to act unilaterally. "For the procedures of the Act are purposefully long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." [30]

We do not say that the time of service of notice is completely irrelevant to the duties of the parties. It may be that a notice served the day after the Award would betoken bad faith to the point of vitiating its validity. We shall have occasion to point out that certain union notices were defective for analogous reasons. But the mere fact that the union notices were served prior to January 25, 1966, did not relieve the carriers of their duty to confer and bargain prior to January 25, 1966. We are not considering a case where the railroads, while conceding that the unions had a right to begin bargaining prior to the expiration date, responded that the particular notice came too early, perhaps on the ground that it did not permit enough experience under the existing rules to spawn realistic and informed bargaining. In the case before us the carriers flatly refused to engage in any statutory bargaining whatever prior to the expiration date. Except in the case of objectionable union proposals discussed below, the carriers before us must be held to have breached their

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[30] Brotherhood of Railway Clerks v. Florida E.C. Ry., 384 U.S. 238, 246 (1966). See also Farmer, *Compulsory Arbitration—A Management Lawyer's View*, 51 VA. L. REV. 396, 401-02 (1965).

statutory duty under the Railway Labor Act to confer and bargain on the merits of proposed changes in work rules. The decree of the District Court embodies a contrary declaration, and to that extent it is reversed.

We now consider the effect of our reversal of the District Court's ruling that the notices were not effective to require negotiation until after termination of the Award. As we have seen, conferences are but the first step in the chain of Railway Labor Act procedures. Once they have been frustrated, one side to the dispute can move to the next tier of procedures, and indeed in at least one series of cases involving parties before us the National Mediation Board has accepted jurisdiction of the controversy. The carriers have foresaken their right to insist on conferences by their refusal to respect effective Section 6 notices. The standard for good faith bargaining is quite liberal. Certainly it does not compel agreement. Judge Bryan, after the most careful analysis, formulated the frequently quoted standard that the—

> requirement of good faith bargaining is really a requirement of absence of bad faith. In order to show such lack of good faith it is necessary to establish facts from which it can be reasonably inferred that a party enters upon a course of bargaining and pursues it with the desire or intent not to enter into an agreement at all. *American Airlines, Inc.* v. *Air Line Pilots Ass'n,* 169 F.Supp. 777, 794 (S.D.N.Y. 1958).

Applying such a test, the carriers have breached their duty to enter negotiations in good faith, for a refusal to bargain on an erroneous premise of law is no excuse.[31]

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[31] *See, e.g.,* Order of Railroad Telegraphers v. Chicago & Nw. Ry., 362 U.S. 330 (1960). We do not consider attempts to obtain new work rules incompatible with those imposed by the Award or with the report of the Presidential Emergency Board reflective of bad faith on the part of the unions. Compare Pullman Co. v. Order of Railway Conductors, 316 F.2d 556 (7th Cir.), *cert. denied,* 375 U.S. 820 (1963).

IV

Although the statutory duty to bargain continued during the limited duration award, it was not unaffected by the temporary statute and the arbitration award. Their emanations do affect the conceptions of bargaining in good faith, pursuant to a good faith notice, inherent in the scheme of the Railway Labor Act. We shall develop our specific rulings by considering the three groups of unions in chronological order by dates of notices.

A. Order of Railway Conductors and Brakemen (ORCB)

One group of cases before us, Nos. 20158 and 20191, concerns the Order of Railway Conductors and Brakemen (ORCB).[32] On Monday March 23, 1965, that union, expressly relying on the provisions of the Railway Labor Act, served notices on the carriers which proposed a rule requiring not less than one conductor and two brakemen on all classes of road train service thirty days after notice. That date was, obviously, a full nine months prior to the expiration date of the Award. The carriers considered the notices premature and refused to concede any obligation to bargain on the merits of the proposals.[33] ORCB invoked the services of the National Mediation Board, which docketed the case, but suspended action when the District Court held the notices premature.

We think it manifest that the proposal to scrap the Award during its life time could be broached to the car-

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[32] The District Opinion is reported: Akron & B. Belt R.R. v. Order of Railway Conductors, 253 F.Supp. 538 (D.D.C. 1966).

[33] The carriers lodged a further objection on the ground that the ORCB is not the certified bargaining representative of most of the road brakemen directly affected by the notices. Compare Southern Pac. Co. v. Switchmen's Union of North America, 356 F.2d 332, 335 (9th Cir. 1965). The parties have stipulated this issue out of these proceedings.

riers to see if they were interested but could not be presented to them as a subject of bargaining that was mandatory under a statutory obligation. We agree with Judge Bryan's approach that the collective bargaining system of the Railway Labor Act subsumes and presupposes a bargaining "in good faith." [34] The issue of good faith is interlaced with "bargainability"—a term of art which means not only capable of being bargained but also a proper subject of mandatory bargaining. We have already held that the carriers were in bad faith in asserting that they had no legal obligation to bargain during the life of the Award. They had an obligation, we think, to bargain about changes to become effective with the expiration of the Award. But we also think that they had no obligation to bargain about a proposal to make changes during the life of the Award. Such an obligation would be inconsistent with an inherent and essential element of Public Law 88-108, which was intended to promote long range solutions through collective bargaining by removing the need to bargain over immediate crises.

The ORCB argues that the carrier's duty to bargain is reaffirmed by Section III of the award of Board 282 which directs the parties to resume local negotiations on crew consist. We agree that the unions could have called on the carriers to negotiate pursuant to the Award. But this is entirely different from the statutory duty imposed by Section 6 of the Railway Labor Act, upon which the union purported to rely. The Award machinery was essentially different from and displaced the Railway Labor Act concerning rules effective during the life of the Award. This is demonstrable from the provision of the Award that specified that if the parties were unable to arrive at an agreement their dispute should be referred to a local arbitration tribunal. This is, of course, entirely different from and supersedes the basic structure of the Railway

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[34] *See* American Airlines Inc. v. Air Line Pilots Ass'n., *supra*, 169 F.Supp. at 793-95.

Labor Act which provides for compulsory arbitration only for minor disputes, and contemplates mediation or voluntary arbitration where agreement has not settled "major disputes," i.e. disputes relating to changes in rates of pay, rules or working conditions.[35] In this context, we agree that these notices were premature.

B. Brotherhood of Railroad Trainmen (BRT)

In another group of cases (Nos. 20152, 20172, 20229 and 20249) we are concerned with the Brotherhood of Railroad Trainmen (BRT).[36]

On June 30, 1965, BRT served a notice proposing that beginning January 26, 1966 (unquestionably after the termination of the Award) a new work rule be inserted in the agreements between the BRT and the carriers requiring that not less than two, or in some cases three, brakemen be included in the "crew consist" of the carrier's runs. In most instances the carriers in turn served counter-proposals with respect to crew consist rules, although they took the formal position that the BRT notices were premature and that during the life of the Award the only proper procedure for instigating crew consist changes was in accordance with Part A(3) of Section III of Award 282.[37]

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[35] *See* Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 722-28 (1945).

[36] These are appeals from judgments following the opinions in Akron & B. Belt R.R. v. Brotherhood Railroad Trainmen, 250 F.Supp. 691, 252 F.Supp. 207, and 254 F.Supp. 306 (D.D.C. 1966). The Switchmen's Union of North America (SUNA) is also a party in Appeals 20152 and 20172.

[37] "Either party in interest shall give written notice of any proposed change in any such stipulated number of trainmen. . . . The time and place for the beginning of conferences between the representatives of the parties in interest with respect to such proposed change or changes shall be agreed upon within 10 days after the receipt of said notice, and said time shall be within 15 days after the receipt of said notice."

The carriers' denial of an obligation to bargain with the ERT was essentially based on the contention of prematurity which we have already considered and rejected.

We turn to the carriers' current argument that Section 6 of the Railway Labor Act cannot meaningfully impose a duty to bargain during the life of the Award about changes following its expiration, since this would undercut bargaining pursuant to the Award concerning work rules during the life of the Award. We see no inherent inconsistency such as we found in discussion of the ORCB proposals. Bargaining and arbitration for rules to be in effect for a two-year period are not inherently negatived by tandem bargaining under a different system over long-range rules. Conflict in scheduling might be a temporary problem, but it could hardly dignify a complete denial of a duty to bargain over the ultimate and dominant issues.

C. Brotherhood of Locomotive Firemen and Enginemen (BLFE)

The third major group of cases, Nos. 20192, 20193, 20215 and 20216, involves the Brotherhood of Locomotive Firemen and Enginemen (BLFE).[38]

In November 1965 this union served notices to take effect at 12:01 a.m. on March 31, 1966, the day after the Award, as extended by stipulation, was to expire. There were three notices, each made expressly pursuant to the Railway Labor Act. Notice No. 1 related to the types of engine services on which the employment of firemen would be required, and would have pegged employment at a level of 6000 jobs below the terms of the National Diesel Agreement, but far above the level provided by Award 282. Notice No. 2 provided for compensation to firemen who had been relocated, severed, or other-

[38] These are appeals from judgments following the opinion in Bangor & A.R.R. v. Brotherhood of Locomotive Firemen, 253 F.Supp. 682 (D.D.C. 1966).

wise disadvantaged by the operation of Award 282. By stipulation of the parties we need not here consider Notice No. 3, which set out a training program for apprentices. The carriers contended that all such notices were premature, and further contended that the second and third were not even proper subjects of collective bargaining. Several abortive conferences were held, but the carriers resisted any attempts to reach the merits of the proposed rules.

In the BLFE consolidated declaratory judgment actions, the District Court agreed with the carriers on the major points, holding Notices 1 and 2 not only premature but also *non-bargainable* although the carriers had not even challenged the bargainability of the first notice. The court's interjection seems not only to have provided an additional reason for holding that the carriers had not violated a legal obligation in the past, but also to have prompted the carriers to seek restriction of their obligation to bargain in the future.

With the controversy thus expanded when there was already uncertainty as to the exact legal rights of the parties, the issue became the subject of a legal ruling. Since the genie can not be put back into the bottle, we turn to consideration of the soundness of the determination by the District Court, and we conclude that it was not a correct statement of applicable legal doctrine.

The District Court reasoned that—

> the employees may not in the guise of serving notices under Section 6 of the Railway Labor Act, seek to abrogate or set aside the Award. It must be borne in mind that the Award is the result of a compulsory arbitration conduced under a mandate of Congress and has the stamp of judicial approval in the form of a judgment in a proceeding to impeach it. Neither a carrier, nor a union may institute proceedings, directly or indirectly, to set aside any provision of the Award, or the operations or activities that have

taken place under it or the results that have been achieved.[39]

Since these notices were found not to "relate to matters subject to collective bargaining under the statute," the court declared that they "need not be complied with." 253 F.Supp. at 689. We disagree and are of the view that Congress did not intend that either Public Law 88-108 or Award 282 would permanently excise from the scope of collective bargaining any proposals that otherwise would have been lawful under the Railway Labor Act. Applying this standard, we find that Notice No. 1 falls within the realm of proper collective bargaining, but Notice No. 2 does not.

We begin our reasons for reaching this conclusion with a review of the principles surrounding disputes about bargainability. The settled tradition under the Railway Labor Act reveals a firm obligation on the railroads and their employees to negotiate about changes in working conditions suggested by one side or the other. In the landmark case of *Virginian Ry.* v. *System Federation No. 40, Railway Employees Dep't*, 300 U.S. 515, 548 (1937),[40] Justice Stone held that while the Act does not compel agreement, it does demand those preliminary steps, triggered by a Section 6 notice, without which no agreement could be reached. The minimum requirements are that the employer at least meet with the union to listen to its proposals and to make a reasonable effort to achieve an accord.

The subjects for mandatory mutual consideration are defined in Section 6 merely by reference to "rates of pay,

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[39] Bangor & A.R.R. v. Brotherhood of Locomotive Firemen, *supra* note 38, 253 F.Supp. at 687.

[40] *Accord,* Elgin, J. & E. Ry. v. Burley, *supra* note 35, 325 U.S. at 724-25 (1945).

rules, or working conditions." [41] But the courts have ratified the practice of the industry so that the duty to bargain "generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States." [42] That is, "what carriers must legally bargain about is affected by what is in fact bargained about in the railroad world." [43]

The scope of bargainability is extremely broad. The recent guidepost opinion in *Order of Railroad Telegraphers* v. *Chicago & Nw. Ry., supra* note 31, 362 U.S. at 338 (1960) states:

> In an effort to prevent a disruption and stoppage of interstate commerce, the trend of legislation affecting railroads and railroad employees has been to broaden, not narrow, the scope of subjects about which workers and railroads may or must negotiate and bargain collectively. Furthermore, the whole idea of what is bargainable has been greatly affected by the practices and customs of the railroads and their employees themselves. It is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees as well as the interests of the railroad and the public at large.[44]

The court upheld the right to strike to compel bargaining on a proposed work rule change to prevent the carrier from abolishing positions in existence before a certain date. The court rejected the carrier's contention that the

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[41] *See also* 45 U.S.C. § 152, Seventh (1964).

[42] Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 346 (1944).

[43] United Indus. Workers of Seafarers Int'l Union v. Board of Trustees of Galveston Wharves, 351 F.2d 183, 191 (5th Cir. 1965).

[44] *Cf.* Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 209-15 (1964).

proposal was not part of a legitimate "labor dispute" because it sought to perpetuate "wasteful" and "unnecessary" jobs.

The scope of "work rules" discussed by railroads and unions over the past century, including the use of firemen and the manning of trains,[45] has greatly exceeded what a layman might expect the term to include. Bargaining in the rail industry has comprehended fields frequently reserved to management in other industrial contexts. Not until the railroads began to experience the pressure of advancing technology and vigorous competition from other modes of transportation after the Second World War was there any suggestion that some questions of mutual interest might be beyond the pale of required bargaining. Increasingly, the roads have come to use the allegation of non-bargainability, and have sought judicial rulings to protect managerial discretion.[46] Rarely have the courts sanctioned this technique, and recent pronouncements do not augur well for its encouragement.

This setting bids us be chary of the conclusion of the District Court that there was no bargainability in Notice No. 1 which proposed that for the future the parties establish work rules different from those prescribed by the Award for a two-year period. The court stated that Notice No. 1 "demands the restoration of firemen on those runs for which Award 282 expressly held firemen were unnecessary. Obviously, compliance with this notice would be a consent to abrogate and do away with the outcome of the

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[45] See H.R. Rep. No. 713, 88th Cong., 1st Sess. 6 (1963); Comment, *The Railway Work Rules Dispute—A Precedent for Compulsory Arbitration*, 14 DE PAUL L. REV. 115, 119-20 (1964). *See also* Brotherhood of Locomotive Engineers v. Chicago, Rock I. & Pac. R.R., *supra* note 4, 382 U.S. at 429.

[46] See the excellent discussion in Weber, *Public Policy and the Scope of Collective Bargaining*, 13 LAB. L.J. 49 (1962).

arbitration." [47] The District Court gave no clue as to how in its opinion a Section 6 notice could validly propose changes in the work rules established by the Award, by what method, and to what extent.

In our view its conclusion was erroneous. The crisis conditions of 1963 evoked an unusual response from Congress, but one not intended to displace totally the framework of labor relations law and practice in the field. The phrasing of Public Law 88-108 and the reports that accompanied it make clear that Congress in its controlled response did not intend to effect a permanent alteration in development of collective bargaining. The preamble set the tone of the statute, declaring that "it is desirable to achieve [the protection of the national interest] in a manner which preserves and prefers solutions reached through collective bargaining. . . ." According to Section 3, the statute expired of its own terms one-hundred and eighty days after enactment. The Award of the Arbitration Board, by virtue of Section 4, could not "exceed two years from the date the award takes effect, unless the parties agree otherwise." Section IV of the Award itself reiterated the limited duration of the terms imposed and specified it would be in force for two years "unless the parties agree otherwise."

This dual theme of limited survival and contractual freedom infuses a proper resolution of this case, and does so with a spirit that is frustrated by the District Court's conclusions of non-bargainability (and indeed of prematurity). In providing in Section 3 of the law that the Award would be "binding on both the carrier and organization parties" and constitute a "complete and final disposition" of the major issues, Congress meant only that the Board's conclusions were to have the status of arbitration awards in the classic sense, not merely of mediation sug-

[47] Bangor & A.R.R. v. Brotherhood of Locomotive Firemen, *supra* note 38, 253 F.Supp. at 688.

gestions or fact-finding as in the ordinary major dispute under the Railway Labor Act. But Congress contemplated and intended that the parties could continue to work out a settlement different from that imposed by the Board to be effective for a limited two-year period. In submitting the Administration draft to Congress, "President Kennedy repeatedly emphasized to the Congress his hope that the dispute could eventually be settled by collective bargaining." *Brotherhood of Locomotive Engineers* v. *Chicago, Rock I. & Pac. R.R., supra* note 4, 382 U.S. at 431. The President "expressed no desire to have Congress pass a law that would finally and completely dispose of the problem," observing that it would be " 'wholly inappropriate to make general and permanent changes in our labor relations statutes. . . .' " *Id.* at 432. And the Congress "enacted the bill proposed by the President" with but "one significant change" not relevant here. *Ibid.*

Congress emphasized in unambiguous terms that the parties were not to be locked in by the terms of the Award on the firemen and crew consist issues:

> It should be especially noted that, although the joint resolution provides for arbitration on these two issues, the parties may still bargain collectively on these issues, and resolve them among themselves. This process may take place before the arbitration board is established; after the board has initiated its proceedings; and may also take place after the board has made an award. By agreement, the parties may make the appointment of the board unnecessary; may make the decision of the board unnecessary; *and may supersede the decision of the board—all through collective bargaining.* H.R. Rep. No. 713, 88th Cong., 1st Sess. 13 (1963). (Emphasis added.)

We find it impossible to accommodate the operative language and animating philosophy of Public Law 88-108 with the District Court's holding that Notice No. 1 was non-bargainable. The carriers argue now that the District

Court did not foreclose all possibility of altering the rules imposed by the Board, but meant only to vindicate its efforts by precluding return to the status quo ante. Even if we agreed that the BLFE's Notice No. 1 would have that effect,[48] nothing we detect forbids proposing just such a complete regression. At least, we hold that under the Railway Labor Act, and after taking into account such qualification of that law as is fairly implied from Public Law 88-108, the BLFE could legitimately require that the carriers negotiate about these proposals for work rules to be operative in the future.

Nothing compels the carriers to accede totally to changes proposed in Notice No. 1, and indeed in light of the realities of collective bargaining it is unlikely that the BLFE expects to insist on complete acceptance of its suggestions. But certainly there was no disability prohibiting the opener that the BLFE included in its first notice.

Notice No. 2, however, falls in a different category. It did not propose certain rule changes to govern the future operation of the railroads. It was aimed directly and undeniably at vitiating the Award of the Arbitration Board, an Award that has long since received judicial confirmance and been fully implemented by the parties. Although Notice No. 2 expressly refers to Section 6 of the Railway Labor Act, the notice on its face demonstrates the irrelevance of Section 6, and the "major disputes" provisions of the Railway Labor Act in general.

Notice No. 2 explicitly proposed that "employees whose employment and seniority were terminated by the application or misapplication of the Award of Arbitration Board 282 will, on [the expiration of the Award as extended by

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[48] We note, however, that apparently 6000 fewer firemen would have been required under the proposed rules than the National Diesel Agreement had provided.

stipulation], be recalled and restored to the seniority roster and employed with their original seniority date and used as firemen (helpers)...." In subsequent sections, the notice proposed that employees terminated in the course of implementing Award 282 be reimbursed for monetary loss due to the termination and deprivation of seniority, including expenses incurred for meals, travel, lodging, and change of residence when relocating for other assignments.

These proposals relate to alleged past grievances. We are concerned here with bargainability, and instinct in the essence of collective bargaining is a notion of mutality, that if a subject is brought up each side has at least the authority both to offer and to concede.

What is the status of the union concerning the subject it proposed for bargaining in Notice No. 2? We turn to *Elgin J. & E. Ry.* v. *Burley, supra* note 35, 325 U.S. at 739:

> To settle for the future alone, without reference to or effect upon the past, is in fact to bargain collectively, that is, to make a collective agreement. That authority is conferred independently of the power to deal with grievances, as part of the power to contract "concerning rates of pay, rules, or working conditions." It includes the power to make a new agreement settling for the future a dispute concerning the coverage or meaning of a preexisting collective agreement. For the collective bargaining power is not exhausted by being once exercised; it covers changing the terms of an existing agreement as well as making one in the first place.
>
> But it does not cover changing them with retroactive effects upon accrued rights or claims. For it is precisely the difference between making settlements effective only for the future and making them effective retroactively to conclude rights claimed as having already accrued which marks the statutory

boundary between collective bargaining and the settlement of grievances.

The Court held that a union had no lawful authority to bargain for some of its members in settling claims they asserted against the railroad arising from the application of new work rules. The court observed that the railroad was not entitled to assume from the union's status as bargaining agent that it had the right to settle claims for past grievances, and that any agreements reached were without legal significance.

This analysis has an immediate bearing on our situation. The BLFE proposed that the carriers jettison the rights that had accrued to them under the Award, for the Notice by its terms is limited to rehiring and reimbursing those employees terminated in implementing Award 282. If Award 282 meant anything it provided the sanction of Congress for the railroads' authority to discharge thousands of firemen. This permission was sharply narrowed by stringent protective provisions under which severed employees have already received many millions of dollars in benefits. The rights to these payments vested when the employees were discharged pursuant to the Award. The BLFE Notice proposed that the carriers renounce their vested rights. But the bargainability of this subject matter as a proposal for a change in "work rules" is undercut by the fact that the *Elgin* case squarely denies the BLFE any warrant in law to "bargain" over any possible concession on the employee's side to make a refund, or even partial refund, of any severance benefits already vested or paid. Clearly a proposal that cannot lawfully be adopted is non-bargainable.[49] Since the union could not bargain away any part of the rights that accrued to employees under the Award, it could not compel the

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[49] *See* Southern Pac. Co. v. Switchmen's Union of North America, *supra* note 33, 356 F.2d at 334-35.

railroads to bargain on a proposal that they surrender rights that accrued to the carriers under the Award, which defined and limited the liability of the carriers arising from changes made in accordance with the Award.

In Notice No. 2 the union claimed there had been misapplication of the award. As to this it suffices to point out that Section 8 of the Railway Labor Act [50] and Section 4 of Public Law 88-108 permit the union to bring forward, questions of interpretation as to the scope and applicability of the Award for resolution by Board 282.[51] But these would not be comprehended by Section 6 of the Railway Labor Act, governing proposed changes in work rules, classified as major disputes.[52] The rest of Notice No. 2 is inherently an attack on the fairness of the Award —and that is not bargainable under Section 6 consistently with the purpose of Public Law 88-108, and the Award thereunder and its judicial confirmance.

• • • •

It is our hope and contemplation that any further litigation will be conducted with a fresh outlook. The halls of justice should not be an arena where gladiators are spurred on in desperate combat. They provide a forum where legal disputes can be settled, with a minimum of rancor, so as to further the Congressional objective of

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[50] 45 U.S.C. § 158(m) (1964).

[51] *See* Brotherhood of Railroad Trainmen v. Terminal R.R. Ass'n, —— U.S.App.D.C. ——, —— F.2d —— (No. 20135), decided this day.

[52] The BLFE contends in its brief that there is nothing wrong with retroactive contract proposals and agreements, and suggests that they are used frequently in industrial relations. Whatever may be the general practice, and regardless of what other provisions of the Railway Labor Act may require, there is no duty to bargain collectively over the settlement of past grievances that is imposed by Section 6.

agreement and, if possible, harmony between carriers and unions.[53]

The parties are directed to submit within 10 days a proposed judgment, and to confer and endeavor to agree thereon. At that time the parties may also request supplemental rulings on any matters that have not been discussed in this opinion.

Affirmed in part, reversed in part.

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[53] This court's opinions in the instant cases will undoubtedly have bearing on others arising in one way or other out of Award 282.

Before the present division are ten cases, Nos. 20152, 20158, 20172, 20191, 20192, 20193, 20215, 20216, 20229 and 20249.

Before the instant division also is No. 20316, decided today.

Previously argued before Judges Bastian, Burger and Wright are five cases, Nos. 19867, 20003, 20004, 20212 and 20213.

Case No. 20135, decided today, came before Chief Judge Bazelon, Senior Circuit Judge Edgerton and Circuit Judge Coffin, (of the First Circuit, sitting by designation).

Hitherto in the District Court, cases involving the railway work rules disputes have been referred to a single District Judge. The fact that we have differed from him in some aspects of relief granted or of the basis of rulings should not be permitted to obscure our appreciation for the prodigious effort he has made in response to so difficult an assignment, and for the commendable manner in which he has approached so many novel and complex questions.

In today's text we have undertaken definition of the basic legal principles applicable to future consideration of the issues. It would seem that sound judicial administration of the District Court's business will be served by rotation of this assignment at this juncture. We have in mind avoidance of further burdening of this District Judge and the broadening of application of pertinent judicial expertise and exposure in meeting our common problems in this area. So it is that we have ourselves achieved some distribution of the workload, and we regretfully assume that there may yet be heavy demands on judicial manpower in the District Court by reason of railroad work rules controversies.

APPENDIX

Public Law 88-108

Act of August 28, 1963, 77 Stat. 132.

Whereas the labor dispute between the carriers represented by the Eastern, Western, and Southeastern Carriers' Conference Committees and certain of their employees represented by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America, labor organizations, threatens essential transportation services of the Nation; and

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained; and

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not resulted in settlement of the dispute; and

Whereas the Congress find that emergency measures are essential to security and continuity of transportation services by such carriers; and

Whereas it is desirable to achieve the above objectives in a manner which preserves and prefers solutions reached through collective bargaining; and

Whereas, on August 2, 1963, the Secretary of Labor submitted to the carrier and organization representatives certain suggestions as a basis of negotiation for disposition of the fireman (helper) and crew consist issues in the dispute and thereupon through such negotiations tentative agreement was reached with respect to portions of such suggestions; and

Whereas, on August 16, 1963, the carrier parties to the dispute accepted and the organization parties to the dis-

pute accepted with certain reservations the Secretary of Labor's suggestion that the fireman (helper) and crew consist issues be resolved by binding arbitration but the said parties have been unable to agree upon the terms and procedures of an arbitration agreement: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That no carrier which served the notices of November 2, 1959, and no labor organization which received such notices or served the labor organization notices of September 7, 1960, shall make any change except by agreement, or pursuant to an arbitration award as hereinafter provided, in rates of pay, rules, or working conditions encompassed by any of such notices, or engage in any strike or lockout over any dispute arising from any of such notices. Any action heretofore taken which would be prohibited by the foregoing sentence shall be forthwith rescinded and the status existing immediately prior to such action restored.

Sec. 2. There is hereby established an arbitration board to consist of seven members. The representatives of the carrier and organization parties to the aforesaid dispute are hereby directed, respectively, within five days after the enactment hereof each to name two persons to serve as members of such arbitration board. The four members thus chosen shall select three additional members. The seven members shall then elect a chairman. If the members chosen by the parties shall fail to name one or more of the additional three members within ten days, such additional members shall be named by the President. If either party fails to name a member of members to the arbitration board within the five days provided, the President shall name such member or members in lieu of such party and shall also name the additional three members necessary to constitute a board of seven members, all within ten days after the date of enactment of this joint resolution. Notwithstanding any other provision of law, the National

Mediation Board is authorized and directed: (1) to compensate the arbitrators not named by the parties at a rate not in excess of $100 for each day together with necessary travel and subsistence expenses, and (2) to provide such services and facilities as may be necessary and appropriate in carrying out the purposes of this joint resolution.

Sec. 3. Promptly upon the completion of the naming of the arbitration board the Secretary of Labor shall furnish to the board and to the parties to the dispute copies of his statement to the parties of August 2, 1963, and the papers therewith submitted to the parties, together with memorandums and such other data as the board may request setting forth the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement. The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve the matters on which the parties were not in agreement, and shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration.

Sec. 4. To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, the board's

award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act. The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed, and the arbitration board shall report to the National Mediation Board in the same manner as arbitration boards functioning pursuant to the Railway Labor Act. The award shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise.

Sec. 5. The arbitration board shall begin its hearings thirty days after the enactment of this joint resolution or on such earlier date as the parties to the dispute and the board may agree upon and shall make and file its award not later than ninety days after the enactment of this joint resolution: *Provided, however,* That said award shall not become effective until sixty days after the filing of the award.

Sec. 6. The parties to the disputes arising from the aforesaid notices shall immediately resume collective bargaining with respect to all issues raised in the notices of November 2, 1959, and September 7, 1960, not to be disposed of by arbitration under section 3 of this joint resolution and shall exert every reasonable effort to resolve such issues by agreement. The Secretary of Labor and the National Mediation Board are hereby directed to give all reasonable assistance to the parties and to engage in mediatory action directed toward promoting such agreement.

Sec. 7. (a) In making any award under this joint resolution the arbitration board established under section 2 shall give due consideration to the effect of the proposed award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration to the nar-

rowing of the areas of disagreement which has been accomplished in bargaining and mediation.

(b) The obligations imposed by this joint resolution, upon suit by the Attorney General, shall be enforcible through such orders as may be necessary by any court of the United States having jurisdiction of any of the parties.

Sec. 8. This joint resolution shall expire one hundred and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence.

Sec. 9. If any provision of this joint resolution or the application thereof is held invalid, the remainder of this joint resolution and the application of such provision to other parties or in other circumstances not held invalid shall not be affected thereby.

Approved August 28, 1963.

APPENDIX F

Appeals from the United States District Court
for the District of Columbia

Supplemental Opinion Filed July 31, 1967

Mr. Milton Kramer was on the brief for appellants in Nos. 20,152, 20,229 and 20,249 and appellees in No. 20,172.

Mr. James D. Hill for appellant in No. 20,158 and appellee in No. 20,191.

Mr. Joseph L. Ruah, Jr., with whom *Messrs. John Silard, Daniel H. Pollitt, Isaac N. Groner, David Epstein* and *Stephen E. Moss*, were on the brief for appellant in Nos. 20,192 and 20,193 and appellee in Nos. 20,215 and 20,216.

Mr. Francis M. Shea, with whom *Mr. Richard T. Conway* was on the brief for appellants in Nos. 20,172, 20,191, 20,215 and 20,216 and appellees in Nos. 20,152, 20,158, 20,192, 20,193, 20,229 and 20,249. *Messrs. David Booth Beers* and *Ralph J. Moore, Jr.*, also entered appearances for appellants in Nos. 20,215 and 20,216.

Before DANAHER, *Circuit Judge*, BASTIAN, *Senior Circuit Judge*, and LEVENTHAL, *Circuit Judge*.

Supplemental Opinion

LEVENTHAL, *Circuit Judge:* On May 12, 1967, this court released its opinion disposing of many of the legal questions arising from the railway work rules disputes and the compulsory arbitration statute passed by Congress in 1963 to handle the controversies. Because of the number and complexity of the issues, we directed the parties to

confer in an effort to propose a judgment embodying our rulings, and invited them to request supplemental rulings on any points not explicitly covered by our opinion.

The parties have submitted numerous requests for supplemental rulings, for reconsideration, and for clarification.

I *The New Plateau Work Rules Continuing In Effect*

A. Brotherhood of Railroad Trainmen (BRT)

The carriers contend that our "new plateau" rationale, holding that the substantive terms effected by Award 282 continue in force after the formal expiration date of the Award until changed pursuant to the Railway Labor Act, logically requires reversal of the District Court's ruling that the procedures established by Award 282 for special arbitaration awards on the trainmen issue lapsed at the termination of the Award. We disagree.

Our decision rests on an accommodation of the sometimes divergent directives of Public Law 88-108, Award 282, and the Railway Labor Act. Throughout, our touchstone has been our understanding of dominant Congressional intention. We viewed Congressional intervention in 1963 as reflecting a sensitivity to the dangers of imposing drastic changes on the pattern of railway labor collective bargaining.

The point is simply this: We think Congress meant that changes in substantive work rules issuing forth after the expiration of Award 282 should not be wrought by the compulsory edict of a board, but should either be reached by agreement of the parties or should be born out of their actions under the Railway Labor Act, an act which regulates their conduct of bargaining so as to promote the possibility of agreement, with the assistance of the National Mediation Board or other special boards.

This dominant Congressional intention means that a difference must be drawn between those actions of Board

282 and its agents prior to the expiration date of Award 282 which effected changes in substantive work rules, and those actions which merely constituted issuance of procedures for promulgating future changes in substantive work rules. The completed changes in substantive work rules continue on—unless and until changed again in accordance with the Railway Labor Act. But there is no continuance of what are in effect only procedures for issuing future changes in substantive work rules.

Those procedures constituted a special mechanism for making changes by award, and were intended to have only a two-year life. Upon the expiration of the two-year period the special machinery was exhausted and in the absence of agreement only the system of the Railway Labor Act was available for future changes in substantive work rules. Consequently, in the absence of ratification by agreement of the parties, a local adjustment board had no independent legal authority that would permit it to achieve an alteration in substantive work rules subsequent to the expiration of the two-year period.

B. Brotherhood of Locomotive Firemen and Enginemen (BLFE)

The parties are in disagreement as to the import for the Firemen of our ruling as to the Trainmen, a ruling announced in our May 12 opinion and adhered to on reconsideration for the reasons noted above.

On the firemen issue, Board 282 decided that most firemen could be dispensed with for other than steam power engines. It developed a procedure permitting the "blanking" of firemen positions as follows: Each carrier could list those engine crews on which it thought firemen unnecessary for reasons of safety or workload. These positions could then be blanked, except that each local union chairman was given the right within 30 days of receipt

of the carrier's list to designate up to ten percent of these crews as requiring continued employment of firemen. The Award refers to this right to designation as based upon considerations of safety, undue work burden and adequate and safe service to the public, but provided that the designation shall not be subject to challenge or review. This procedure was designed to take place at three month intervals.

A dispute arose when it came time to decide what happened to this procedure, and the results it had reaped, when Award 282 expired.

The carriers insisted that when Award 282 expired the procedures continued in effect as part of the new plateau of work rules, and constituted a continuing mechanism for reducing the employment of firemen unless and until changed in accordance with Section 6 of the Railway Labor Act. The BLFE argued both that this procedure passed out of existence when the Award terminated, and that the changes it had effected lapsed, so that positions blanked during the life of the Award were resurrected. The District Court ruled that a "new plateau" had been created that preserved what had been accomplished by the carriers under the Award in reducing firemen's positions, but held that the carriers could no longer resort to the machinery created by the Award to make further job cuts. The District Court concluded, however, that the carriers were prevented only from taking "affirmative acts" in reliance on the Award, but explained that this did not prevent the carriers from refusing to fill vacancies resulting from natural attrition. The underlying premise of that court's decision was that Award 282 superseded the requirements of the National Diesel Agreement which would otherwise demand the use of firemen on all locomotives.

As set forth in our May 12 opinion, this court has rejected, though for somewhat different reasons, the con-

tention of the BLFE that after March 30, 1966, the *status quo ante* compulsory arbitration was automatically restored. While we explicitly ruled that the procedure created by the Board for making new crew consist rules expired when the Award did, we did not previously examine the problem presented in the firemen context.

The BLFE insists that there is no tenable distinction whereby firemen should be subject to continuing reductions under the Award though trainmen are not similarly affected. The carriers concede that it is difficult to distinguish the two situations, but suggest that the Award might be viewed as merely setting forth a procedure for crew consist changes but as directly affecting the firemen rules.

Once again we find both parties somewhat out of alignment with our basic premises. We have endeavored to make it clear that nothing of the Award survived its expiration date. It is the work rules resulting from the Award that endure, by virtue of the Railway Labor Act; they are deemed to be incorporated into the prior agreements of the parties that themselves endure by virtue of the Railway Labor Act unless and until changed in accordance with that statute. We must therefore discern what "work rules" were put into effect under and prior to the expiration of Award 282.

The Award did not dispense with the use of firemen. It began by continuing in force all "agreements, rules, regulations, interpretations, and practices, however established," except as modified by the Award. The Award provided procedures whereby the carriers could mark firemen jobs for extinction, and also established a reciprocal power in the local BLFE chairman to immunize from elimination ten percent of the crews listed. The Opinion of the Neutral Members of Board 282 makes abundantly clear that the Board recognized that the Award had the

effect only of sanctioning a procedure of limited duration for accomplishing a reduction in crew consist and the use of firemen. The Board explained that it was conscious that the immediate impact of the Award might be small, but that this was a deliberate choice reflecting concern for the human factor in the equation and the goal that the Award would establish some principles that could contribute to a final solution to the problems:

> The Board's award will remain in force only two years. Within that time the effect of attrition may be such that the number of firemen or train crew jobs actually eliminated may be comparatively small. *Opinion of Neutral Members,* 41 LAB. ARB. 680, 681.

The Board members themselves characterized what they did as having "established a *procedure* for determining whether, considering safety, workload, and adequacy of transportation service, particular jobs should be made subject to elimination." (p. 681) (Emphasis added.). In explaining why the Award provided that the union could insist on saving ten percent of the jobs marked for elimination, the Neutral Members reasoned that this procedure would obviate the possibility of objections, based on safety or convenience, to individual proposals for job reduction. The underlying premise, as explicated by the Board, was that the Award would be able to authorize such reductions only during two years, and unless an efficient procedure were provided for making specific decisions "the likelihood of reducing [the number of disputes over individual jobs] significantly in a two-year period would not be very great." (p. 690). Because of the two-year limitation on the Award, the Board doubted that any standards it might prescribe could be applied in particular disputes "in sufficient time to yield any significant results." (p. 690).

As the event turned out the carriers used the Award's procedures to terminate many more firemen jobs than the

Board predicted.[1] The Neutral Members' underestimate does not undercut but rather underlines the view that the mechanics for reduction in firemen jobs were procedures of necessarily limited duration, rather than work rules with continuing vitality.

Our conclusion is that the provisions in the Award for establishing new firemen levels did not constitute "work rules" in the classic sense, as we have used and applied that term, but instead are more accurately described as procedures for establishing new work rules. The history of labor relations agreements in this industry reveals that the manning work rules were expressed in terms of ultimate results, like one-conductor-and-three-brakemen, or firemen-required-on-all-freight-locomotives, and were not formulated in terms of a methodological approach. This practical construction of the concept of work rules is reinforced by the Board's expressions treating the mechanics of lists and designations as procedures. Accordingly, for purposes of determining what "work rules" were in force on the last day of the life of Award 282, we do not consider the procedures provided by the Award for changing job requirements as being themselves part of the substantive "work rules." These procedures, like the procedures for changing substantive work rules for crew consist of trainmen, had no effectiveness after the expiration of the Award.

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[1] In the course of Congressional testimony, Chairman Ralph Seward of Board 282 and Assistant Secretary of Labor James Reynolds indicated that their original expectation was that the procedures would lead to a reduction of about 5500 jobs, rather than the 18000 the carriers succeeded in blanking. *See Hearings on the Administration of Public Law 88-108 Before the Senate Comm. on Commerce,* 89th Cong., 1st Sess., ser. 89-45 at 363-64, 465-66 (1965). And according to Senator McGee, the number of firemen eliminated also exceeded the expectations of "Members of the U.S. Senate." *Hearings on the Administration of Public Law 88-108 Before the Senate Comm. on Commerce,* 89th Cong., 2d Sess., ser. 89-56, at 1030 (1966).

This construction also gives what we consider the appropriate effect to the undeniably significant provisions in Public Law 88-108 and Award 282 that limited the effectivness of the Award to two years. Since the Award did not become effective for sixty days after filing, the parties had more than two full years to plan its implementation. The pre-existing work rules, contained in the National Diesel Agreement of 1950, stipulated that "A firemen, or a helper, taken from the seniority ranks of the firemen, shall be employed on all locomotives." Award 282 continued this requirement (and any others stemming from agreement or practice), until changed in accordance with the Award. For two years plus, the carriers had the machinery for proposing, at three month intervals, the crews that they thought could safely and efficiently dispense with firemen positions. The fruits of these notices and negotiations, after adjustment for the Union's ten percent retention, effected what must be rgarded as new "rules" applicable to the particular runs involved. But when the Award expired, so did the procedures it suggested. What survives is the complex of work rules in force on the last day prescribing the substantive terms that controlled the use of firemen on individual runs.

In consequence, a carrier is not only prevented from taking "affirmative acts" under the Award to reduce the use of firemen, as the District Court properly held, but also, if the carrier was required to keep a firemen on a particular crew as of the last day of the Award, it cannot thereafter change the work rule by discontinuing that position, except by agreement or in accordance with Section 6. The work rule that continues in force provides for a fireman on this crew, and that is not changed because the particular fireman on duty dies or retires.

Conversely, however, if the work rule in effect on the last day of the Award provided that a fireman was not required for a particular engine crew—because that crew

was included on the carrier's list of proposed blankable jobs and the union's local chairman did not designate it for retention of a fireman, within the ten percent of crews he could control—the work rule does not require a fireman on that crew even though for one reason or another the carrier had not removed or transferred that fireman by the end of the effective period of the Award.[2] The carrier may thereafter transfer him, or refuse to replace him when he dies or retires. Such action would not constitute a change in work rules but simply an action in accordance with the work rule in force on the critical date, a rule which provided that no fireman was required for that crew.

The National Diesel Agreement was not set aside by the Board. As already noted, the opening section of the Award provided that agreements in force continued in effect except as they were modified by the Award. The Award provided a procedure for modifications during the two-year life of the Award. We recognize that it may be turning back the clock to an era that two presidential boards and the Neutral Members of Board 282 have agreed is technologically outdated, but taking into account the structure of Award 282 as issued, we see no alternative to holding that any new runs created after Award 282 are subject to the National Diesel Agreement, and its requirement of a fireman on each engine crew.

Moreover, the National Diesel Agreement is in effect even though the only reason why a change in its work rule was not made under the Award during its life time was the fact that the change was blocked by a state's full crew law. The Supreme Court has expressly held that while such state law was in effect the Board had no capacity to

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[2] The work rules effectuating the changes made under the Award included the ancillary protective provisions of Part II.C for individuals transferred or separated in implementing the change. These work rules continued in effect after the Award.

make a change contrary to its provisions. *See Brotherhood of Locomotive Engineers* v. *Chicago, Rock I. & Pac. R. R.*, 382 U.S. 423 (1966). The opening sections of the Award dealing with the use of firemen and with crew consists provided for the continuation of work rules, however established, unless changed pursuant to the Award. The repeal of a full crew law subsequent to the expiration of Award 282 came after expiration of the Board's authority under the temporary statute and after expiration of the power of a carrier to invoke the procedures of the Award.

II *Validity of Awards Made January 25, 1966.*

In one respect we have decided to grant reconsideration and modify our opinion as requested by the carriers. In our opinion of May 12, we held that Award 282 was no longer in existence on January 25, 1966, when a special adjustment board rendered crew consist awards between the BRT and two carriers, and that therefore these awards were without legal significance.

We rejected by implication the carriers' argument in brief that the BRT had stipulated to the contrary. On rehearing the carriers point out decisions interpreting statutory provisions that an act be done within a specified period from the date of another action or event so that the initial or trigger date is excluded from the computation. As we were aware, that is of course the modern doctrine and is established by the decisions of this court among others.[3] It is the rule adopted by Rule 6 of the Federal Rules of Civil Procedure. We thought this rule inapplicable because the starting date did not involve problems of a fractional day, and was in turn determined by

[3] *E.g.*, Freeman v. Pew, 61 App. D.C. 223, 59 F. 2d 1037 (1932); Burnet v. Willingham Loan & Trust Co., 282 U. S. 437, 439-40 (1931); Prince v. United States, 185 F. Supp. 269, 271-272 (E.D. Wis. 1960).

a still earlier computation beginning with an initial date that was concededly excluded from computation. This led us to the view that the two-year period prescribed by the Act as the life of the Award did not extend beyond 731 full days (two years of 365 days each, plus February 29, 1964), and that the Award which started at 12:01 a.m. on January 25, 1964, should not be stretched to include the 732nd day of January 25, 1966. We felt that in the peculiar setting of this law that legislative consideration should prevail over the customary formula for computing time.

On further reflection, we think that while this analysis may be sound for an appraisal of the problem in the first instance, a doctrine not adverted to by the parties pre-empts the question. There is hornbook learning to the effect that where there is doubtful language in a statute for performance of an act, the courts prefer that which will confirm rather than destroy any bona fide transaction or title. 52 AM. JUR. *Time* § 18 (1944). This is powerfully underscored by the doctrine, highly relevant to modern needs, that where statutes have been entrusted to administrative agencies for implementation, their construction should be given effect unless plainly unreasonable or in conflict with the plain intent of the legislature.

Board 282 was keenly aware of the problems it faced in possessing only temporary authority. It purposefully selected a standard for the manning rule for firemen that could practicably be administered within that limited time. When the special board assumed that it had the authority to act on January 25, 1966, it must be presumed to have considered the question carefully and with a view to conforming to the intent of Congress as nearly as it could discern that intent.

We note that the Union did not promptly protest the awards as untimely. And further indication that even the Union regarded the time question as at least doubtful

appears from the fact that their notices used a January 26, 1966 date as the effective date for proposed changes. We acquiesce in the interpretation of this doubtful question by the special board involved, since we cannot say this interpretation was unreasonable or violated any plainly ascertainable legislative intent. Accordingly we honor the board's conclusion that January 25, 1966 was the final day of the Award, and hold that the special arbitration awards rendered on that date were effective.

III *Applicability of Section 8 of the Norris-La Guardia Act.*

A. Brotherhood of Railroad Trainmen (BRT)

Appellant Union seeks a ruling that even assuming the District Court had jurisdiction to issue a restraining order, the issuance of the order reflected error in this case.

We are clear that the District Court was correct in holding that it had jurisdiction to enjoin a violation of the Railway Labor Act, and that this jurisdiction was not negatived by or subject to Section 4 of the Norris-La Guardia Act. We affirmed that conclusion in No. 20316, and fully adhere to that ruling.

Although the District Court had jurisdiction to issue the restraining order we think it erred in doing so because—as we subsequently held in our May 12, 1967 ruling—the complainant carriers had failed to comply with their obligations under the Railway Labor Act. Section 8 of the Norris-La Guardia Act, 29 U.S.C. § 108 (1964), provides that a federal court shall not grant a restraining order or injunction in a labor dispute where the complainant "has failed to comply with any obligation imposed by law which is involved in the labor dispute in question."

The issuance of the restraining order was conditioned on the carriers' posting a bond to make good damages, not to exceed $10,000, sustained by any party wrongfully

restrained. We think the Union, which had to obey the injunction or suffer penalties for contempt of court, is entitled to a ruling from this court that vacates an erroneous determination of the District Court, although of course we do not purport to describe what if anything the Union is entitled to collect on the bond.

The District Court erred in concluding that because it held, correctly, that the action was not subject to Section 4 of the Norris-La Guardia Act, which would have ousted the court of jurisdiction, it necessarily followed that the "clean hands" provision of Section 8 of the Norris-La Guardia Act was likewise wholly inapplicable. The Supreme Court has said, speaking through the Chief Justice, that "there must be an accommodation" of this Act with the Railway Labor Act. *Brotherhood of Railroad Trainmen* v. *Chicago R. & Ind. R.R.*, 353 U.S. 30, 40 (1957). That principle of accommodation means that actions to enjoin violations of the Railway Labor Act may be maintained without regard to Section 4 of the Norris-La Guardia Act, and yet be subject to Section 8 of that Act. That is the conclusion of other courts which have considered the matter,[4] and we agree. The point is, simply, that Congress did contemplate actions to effectuate the Railway Labor Act by enjoining violations.[5] That purpose

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[4] *See* Rutland Ry. v. Brotherhood of Locomotive Eng'rs, 307 F. 2d 21, 37-40 (2d Cir. 1962), *cert. denied,* 372 U.S. 954 (1963); Chicago, Rock I. & Pac. R.R. v. Switchmen's Union, 292 F. 2d 61, 64-66 (2d Cir. 1961), *cert. denied,* 370 U.S. 936 (1962); Elgin, J. & E. Ry. v. Brotherhood of Railroad Trainmen, 302 F. 2d 540, 544-45 (7th Cir.), *cert. denied,* 371 U.S. 823 (1962); Manning v. American Airlines, Inc., 221 F. Supp. 301, 304-06 (S.D.N.Y. 1963); *cf.* Brotherhood of Railroad Trainmen v. Toledo P. & W.R.R., 321 U.S. 50, 60-65 (1944); Brotherhood of Railway Clerks v. Florida E. C. Ry., 384 U.S. 238, 247 n. 8 (1966); Brotherhood of Railroad Carmen v. Chicago & Nw. Ry., 354 F. 2d 786, 794-76 (8th Cir. 1965).

[5] Virginian Ry. v. System Federation No. 40, 300 U.S. 515 (1937).

would be utterly defeated if the federal court actions involved were subject to Section 4 of the Norris-La Guardia Act, which had provisions for withholding injunctions in labor disputes reflecting entirely different objectives.

On the other hand a ruling that Section 8 of the Norris-La Guardia Act is applicable to actions to enjoin violations of the Railway Labor Act would not trammel but would rather further the effectuation of that Railway Labor Act, for it ensures compliance by complainant carrier or union which cannot seek an injunction until and unless it has discharged the obligations imposed by the Railway Labor Act.

It may be that in a particular case the District Court might conclude that the imperatives of the Railway Labor Act override Section 8—a statutory focusing so to speak of an equity approach whereby lack of clean hands may be overcome by a balancing of interests, particularly where it is the public interest involved. In a particular case the District Court might conclude that the question of the applicability of Section 8 was doubtful, would require time to explore, and that the restraining order should issue forthwith to avoid jeopardizing the Railway Labor Act. Such approaches would recognize that Section 8 of the Norris-La Guardia Act has some applicability, and is a legislative instruction that weighs heavier in the scale than the clean hands doctrine taken merely as a general equity maxim, yet is overborne by requirements of the Railway Labor Act. Here, however, the approach of the District Court was that Section 8 of the Norris-La Guardia Act was completely inapplicable and that was error. In saying that the restraining order was erroneously entered, however, we do not mean that would excuse a contemptuous violation.

We have said enough to demonstrate that the approach used by the District Court was erroneous. As we have decided, the complainants lack clean hands and the

defendants were not threatening the violation. Therefore, we now rule that the District Court, taking all circumstances into consideration, should permit the Union to recover on the $10,000 bond if indeed it can establish that it sustained ascertainable damage from the issuance of the restraining order.

B. Order of Railway Conductors and Brakemen (ORCB)

This Union argues that, even assuming its notices of March 23, 1965 were premature (as held in our May 12 opinion), the temporary restraining order against the strike was invalid because Section 8 of the Norris-La Guardia Act prohibits the granting of a restraining order to a complainant "who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

Neither the unclean hands doctrine, nor its crystallization in Section 8 of the Norris-La Guardia Act, operates to deny relief to a complainant merely because it has declined to short-circuit the plan envisaged by Congress for obtaining a durable resolution of vexing questions. Congress contemplated that the parties would resume negotiation after they had garnered experience from actually living with the rules decided upon by the arbitrators after giving "due consideration to the effect . . . upon adequate and safe transportation service to the public and upon the interests of the carrier and employees." (*See* Section 7(a) of Public Law 88-108). The general requirement in Section 8 for reasonable efforts at negotiation does not contemplate a departure from the assumptions of a specific statutory plan. Therefore, entry of the restraining order was not improper.

• • •

The Unions have assumed that a full decree will be entered by this court. We think the proper course is to

remand for the District Court to enter decrees in accordance with our rulings. We approve its approach on matters drawn into question except as indicated in our opinions.[6]

The various judgments and decrees appealed from are accordingly vacated and the causes remanded for the entry of fresh decrees not inconsistent with our opinions.

So ordered.

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[6] We affirm both the reasoning and result reached by the District Court in construing the effect of the agreements entered into between the BRT and the Kansas City Southern Railway and Louisiana & Arkansas Railway, and the Wichita Terminal Association. We agree that the correspondence between the BRT and the Richmond, Fredericksburg & Potomac Railroad constituted a crew consist agreement of the same duration as an award by a special adjustment board.

We also approve the District Court's holding that Southern Railway Company and its subsidiaries were proper parties plaintiff in suits involving the ORCB and were covered by Award 282.

APPENDIX G

Before: Danaher, Circuit Judge; Bastian, Senior Circuit Judge; and Leventhal, Circuit Judge.

Judgment

These causes came on for hearings on the records of the District Court and the briefs submitted by counsel, and were argued by counsel.

On May 12, 1967, this court filed an opinion in the above-captioned causes, and invited the parties to submit proposed judgments and to request supplemental rulings within ten days thereafter.

The railroads submitted proposed judgments, and requests for supplemental rulings, and filed petitions for rehearing. The unions also submitted proposed judgments and requests for supplemental rulings, and filed oppositions to the railroads' petitions for rehearing.

Upon consideration of the foregoing, it is

ORDERED AND ADJUDGED by the Court that, except insofar as they are granted in the supplemental opinion filed this date, the aforsaid petitions for rehearing are denied; and it is

FURTHER ORDERED AND ADJUDGED by the Court that, insofar as reflected in the supplemental opinion filed this date, the requests for supplemental rulings are granted; and it is

FURTHER ORDERED AND ADJUDGED by the Court that these cases are remanded to the District Court with directions to vacate the orders and decrees appealed from herein and enter orders and decrees consistent with the opinion of this Court filed May 12, 1967, and the supplemental opinion filed this date.

Per Curiam.

APPENDIX H

Before: Danher, Circuit Judge; Bastian, Senior Circuit Judge; and Leventhal, Circuit Judge, in Chambers.

Memorandum and Order*

These cases were argued on cross-appeals filed by the Brotherhood of Locomotive Firemen and Enginemen (BLFE) in Nos. 20192 and 20193, and by the carriers, Bangor and Aroostook Railroad Co. et al., in Nos. 20215 and 20216.

This court rendered an opinion in these cases, and others consolidated therewith, on May 12, 1967, and filed a supplemental opinion on July 31, 1967.

The carriers filed a petition for rehearing and clarification on August 15, 1967, and on August 25, the BLFE filed a memorandum in opposition to that petition.

The carriers assert, among other things, that this court's opinion, and particularly its supplemental opinion, reflects a misunderstanding of the meaning and application of Award 282 intended by the Board of Arbitration (Board 282).

This court has determined that Board 282 has continuing vitality for deciding questions of interpretation as to the scope and application of the Award. (Opinion of May 12, 1967, pp. 39-40.) It has also made clear that even on a question where the Board did not have final authority, i.e. interpretation of the underlying statute, the court would accept the interpretation of the Board even though contrary to the interpretation the court would itself have rendered, so long as the Board's interpretation was not unreasonable or contrary to ascertainable legislative intent. (Supplemental opinion of July 31, 1967, p. 15).

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* In *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor and Aroostook Railroad Company, et al.*, Nos. 20192-20193, 20215 and 20216.

ACCORDINGLY, now upon consideration of the foregoing, of this court's opinions above cited, and on the record before the court,

It is ORDERED by the court that the carriers' petition of August 15, 1967 is denied, without prejudice however to the Board's seeking leave within thirty days from the date of this order to submit as amicus curiae a showing of respect, if any there be, in which the opinions of this court are inconsistent with the understanding of Board 282 as to the proper meaning and applicability of its award. Issuance of the mandate will be stayed for thirty days.

It is FURTHER ORDERED that the court's supplemental opinion of July 31 be clarified by the addition of the following as a final paragraph of part I of the opinion (p. 13 of slip opinion).

"The carriers argue in effect that the Award at least authorized the carriers to blank firemen positions during the lifetime of the Award, with this personnel action remaining in a state of suspended animation until its vitalization upon repeal of the full crew law. The Court noted in Rock Island, supra, 382 U.S. at 423:

> Congress wanted to do as little as possible in solving the dispute which was before it, and we note that this dispute was not over the size of crews in States which had full-crew laws.

The Board authorized the carriers to list jobs for blanking, and thus provide a classification "when and if such full crew laws are amended or repealed." Answer of May 17, 1964, to Carriers' Question No. 5 under Section II—Part B(1) and B(2). But this conditional blanking was only available as an advance procedure made fruitful if the necessary condition materialized during the 2-year lifetime of the Award. *See Opinion of Neutral Members,* quoted *supra,* 41 LAB. ARB. at 661. The Board's energy was not limited to "the dispute which was before it [Con-

gress]" at the passage of the law, but also extended to firemen manning disputes arising during the critical 2-year period. But the Board's order and interpretations cannot be stretched beyond the Congressional frame of reference to resolve academic differences or disputes that were neither in being at the time nor projected as arising during the 2-year period."

So ordered.

APPENDIX I

Award

This Award is made pursuant to Public Law 88-108, 88th Congress, S.J. Res. 102, enacted August 28, 1963.

The organization parties to the dispute named H. E. Gilbert and R. H. McDonald as organization members of this Arbitration Board. The carrier parties to the dispute named Guy W. Knight and J. E. Wolfe as carrier members of the Board. Benjamin Aaron, James J. Healy, and Ralph T. Seward were named as neutral members by the President.

On September 11, 1963, the Board met, elected its Chairman and adopted rules of procedure. On September 23, 1963, in accordance with Section 3 of the Joint Resolution, the Secretary of Labor furnished to the Board and to the parties to the dispute copies of his statement to the parties of August 2, 1963, together with memorandums setting forth his understanding of the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement.

Public hearings were held in Washington, D. C., on twenty-nine days between September 24 and November 2, 1963, at which witnesses were heard, exhibits introduced and arguments made. Rebuttal exhibits and written arguments were received on November 9, 1963.

On November 6 and 7, 1963, the neutral members of the Board, with the agreement of the parties, visited certain railroad yards in the Chicago area. The sole purpose of these visits was to assist the neutral members in understanding the evidence and arguments presented at the formal hearings and nothing said or shown to them during these visits was accepted as evidence.

During the course of the proceedings, questions arose as to whether certain carriers and certain of their employees were or properly should be parties to the dispute and subject to the Board's jurisdiction. The carriers with regard to which such questions arose were the Union Railroad Company, the Florida East Coast Railway Company, and the Elgin, Joliet & Eastern Railway Company. The Board declined to rule on these jurisdictional questions on the grounds that final determination of the Board's jurisdiction over any particular carrier and any particular group of employees could be made only by the courts and that time did not permit the Board to conduct the special proceedings required for such a determination. Nothing in this Award, however, and no action by the Board, including the reception into evidence of Carriers' Exhibit No. 1 or Employees' Rebuttal Exhibit No. 33, listing certain carriers as parties to the proceeding, is intended to prejudice the position of any carrier or any organization as to these jurisdictional questions.

The Board has incorporated in this Award any matters on which it found the parties were in agreement, has resolved the matters on which the parties were not in agreement, and has given due consideration to those matters on which the parties were in tentative agreement. Further, the Board has given due consideration to the effect of the Award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation.

After a full consideration of the evidence and arguments and upon the entire record, the Board makes a complete and final disposition of the issues submitted and finds and awards as follows.

I. Disposition of Section 6 Notices

Those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto are denied, except to the extent hereinafter provided.

II. Use of Firemen (Helpers) On Other Than Steam Power

Part A—Saving Clause

A(1). All agreements, rules, regulations, interpretations, and practices, however established, with respect to the employment of firemen (helpers) shall continue undisturbed except as modified by the terms of this Award.

Part B—Reductions In Jobs

B(1). Within 7 days following the effective date of this Award, each carrier covered by this Award shall have the right to give to each local chairman of the organization representing firemen (helpers) in each fireman (helper) seniority district a list of pool and regularly assigned freight engine crews (including pool and regularly assigned crews used in mixed, miscellaneous, and unclassified services) and a list of regularly assigned yard engine crews (including regularly assigned crews used in transfer, belt line, and miscellaneous yard services) then employed by the carrier in each such seniority district. The two lists shall include those engine crews which, in the carrier's judgment, based upon considerations of safety, undue work burden, and adequate and safe transportation service to the public, do not require the services of a fireman (helper).

B(2). Each local chairman, within 30 days of receipt of the carrier's lists, shall have the right, based upon con-

siderations of safety, undue work burden, and adequate and safe transportation service to the public, to designate the engine crews in which the carrier shall be required to continue to use firemen (helpers); provided that such designated crews shall not be more than 10 per cent of the freight engine crews, nor more than 10 per cent of the yard engine crews, in any seniority district, as such crews are listed by the carrier. Each local chairman's designation of crews to be operated with firemen (helpers), made as provided herein, shall be final and binding upon the parties in interest and shall not be subject to challenge or review; but prior conference shall be had between the parties in interest with respect to the crews to be so designated by the local chairman. The time and place for the beginning of such conferences shall be agreed upon within 10 days after the receipt of the carrier's lists by the local chairman, and said time shall be within 20 days after the receipt of the said lists.

B(3). At 3-month intervals following the date of the carrier's original lists, the carrier shall give to each local chairman lists of pool and regularly assigned freight engine crews and of regularly assigned yard engine crews which have been established or discontinued in each seniority district during the preceding 3 months and which meet the criteria set forth in paragraph B(1) of this Award; and the number of crews designated by the local chairman in which the carrier shall be required to use firemen (helpers) shall thereafter be adjusted, in the manner provided in paragraph B(2) of this Award; provided that not more than 10 per cent of the pool and regularly assigned freight engine crews nor more than 10 per cent of the regularly assigned yard engine crews, then employed by the carrier in any seniority district and included in either list, shall be designated as crews in which firemen (helpers) must be used.

B(4). Copies of all lists herein required to be furnished by the carrier to the local chairman shall be furnished to the general chairman of the organization involved.

B(5). After the expiration of 37 days following the effective date of this Award, the carrier shall not be required to use firemen (helpers) on other than steam power in any class of freight service (including all mixed, miscellaneous, and unclassified services) or in any class of yard service (including all transfer, belt line, and miscellaneous yard services), other than in crews designated by the local chairman, pursuant to the provisions of paragraphs B(2) and B(3) of this Award, except as may be necessary to provide jobs for firemen (helpers) whose employment rights are retained as provided in Parts C and D of this Award; provided that no yard locomotive shall be operated without a fireman (helper) unless and until it is equipped with a deadman control in good operating condition.

PART C—REDUCTIONS IN EMPLOYMENT

C(1). After the expiration of 37 days following the effective date of this Award, the carrier shall not be required to hire firemen (helpers) on other than steam power in any class of freight service (including all mixed, miscellaneous, and unclassified services) or in any class of yard service (including all transfer, belt line, and miscellaneous yard services) unless or until such new hire is needed to man engine crews designated by a local chairman as provided in paragraphs B(2) and B(3) of this Award; and firemen (helpers) that are unneeded to man such designated crews may be separated from the carrier's payrolls and have all of their seniority and employment rights and relations terminated to the extent permitted in the following paragraphs of Part C of this Award.

C(2). Firemen (helpers) hired on or after a date 2 years prior to the effective date of this Award may be separated from the carrier's payrolls and have all of their employment and seniority rights and relations terminated, and in such case shall be entitled to a lump sum separation allowance in an amount to be determined as provided in

Section 9 of the Washington Job Protection Agreement of May 21, 1936.

C(3). Firemen (helpers) hired prior to a date 2 years prior to the effective date of this Award whose average monthly earnings as firemen (helpers), hostler helpers, hostlers, or engineers have not exceeded $200 during the 24 full calendar months preceding the effective date of this Award, may be separated from the carrier's payrolls and have all of their employment and seniority rights and relations terminated with a severance allowance equal to 100 per cent of their earnings during the preceding 24 calendar months; or may elect to remain on the seniority lists of the carrier with rights to such work as they are qualified to perform, and which may be or become available to them, as provided in Part D of this Award.

C(4). Firemen (helpers) hired prior to a date 2 years prior to the effective date of this Award, who have not performed service as an engineer or as a fireman (helper) since that date, may be separated from the carrier's payrolls as firemen (helpers) and have all of their employment and seniority rights and relations as firemen (helpers) terminated with no severance allowance.

C(5). The provisions of paragraphs C(3) and C(4) of this Award shall not apply to officers or employees of the organizations representing firemen or engineers employed by the carrier, or to supervisory or management officials of the carrier, or to employees on appropriate leaves of absence, or to discharged employees whose cases for reinstatement are pending, providing, if not so situated, they could have met the minimum requirements of service or earnings.

C(6). All other firemen (helpers) with less than 10 years' seniority on the effective date of this Award shall retain their rights to and obligations to protect engine service assignments as provided by rules in effect on the day preceding the day this Award becomes effective, ex-

cept as modified by and subject to the provisions of Part D of this Award, unless and until offered by the carrier another comparable job (such as, but not limited to, engineer, fireman (helper), brakeman, or clerk in the same or another seniority district) for which they are, or can become, qualified. The offer of another job shall carry with it relocation expenses as provided for and under the conditions set forth in Section 10 of the Washington Job Protection Agreement of May 21, 1936, the continuation of accumulated seniority rights toward such purposes as vacation and other applicable fringe benefits, and guaranteed annual earnings, for a period not exceeding 5 years, equal to the total compensation received by each such employee as fireman (helper), hostler helper, hostler, or engineer during the last 12 months in which compensation was received prior to the date of transfer. Such offers of jobs shall be posted and made available to all qualified firemen (helpers) in order of seniority in the seniority district in which the job offered is located. If, within 7 days after notice is posted, no senior man elects to take such offered job, the most junior man then on the fireman (helper) roster in that seniority district must, within 3 days from receipt of written notice, accept the job or all of his employment and seniority rights and relations shall be terminated and, in that event, he shall be entitled to one-half the severance allowance provided for in paragraph C(3) of this Award. If such junior fireman (helper) shall fail to accept such job and thereby terminates his employment as herein provided, the next most junior fireman (helper) on that same roster must accept the job within 3 days from receipt of written notice or forfeit all of his employment and seniority rights and relations with the allowance provided for above. In each case of refusal to accept such job offer the next most junior fireman (helper) shall be required to accept, as provided for above, or forfeit his employment and seniority rights and relations with, in each case, the allowance provided for above, until there are no

firemen (helpers) with less than 10 years' seniority remaining on the seniority roster for the seniority district in which the job offer is located. Thereafter, the same procedure as is provided above shall be followed in the fireman (helper) seniority district which has its principal extra list for firemen (helpers) closest to the location of the job offered.

C(7). Firemen (helpers) with 10 or more years of seniority as of the effective date of this Award, who are not separated from the carrier's payrolls under the provisions of paragraphs C(3) or C(4) of this Award, shall retain their rights to and obligations to protect engine service assignments as provided by rules in effect on the day preceding the day this Award becomes effective, except as modified by and subject to the provisions of Part D of this Award, unless and until retired, discharged for cause, or otherwise removed from the carrier's active working lists of firemen (helpers) by natural attrition.

PART D—RIGHTS TO WORK

D(1). Firemen (helpers) who elect to remain on the seniority lists of the carrier as provided in paragraph C(3) of this Award shall be entitled to exercise their seniority rights as firemen (helpers) to available employment in engine crews used in passenger service and in freight and yard engine crews designated by the local chairmen in their respective seniority districts as provided in paragraphs B(2) and B(3) of this Award, as hostlers or hostler helpers, and as engineers in any class of service for which they are qualified; but such firemen (helpers) shall have no rights to and shall not claim seniority rights to or employment in any other service.

D(2). Firemen (helpers) who remain on the active working lists of the carrier under the provisions of paragraphs C(6) and C(7) of this Award shall have the right to work their turn as firemen (helpers) to the extent that positions

as firemen (helpers) are available in their respective seniority districts on locomotives of the type to which firemen (helpers) were assigned and in a class of service calling for the service of a fireman (helper) prior to the effective date of this Award; provided, that such firemen (helpers) shall have no right to jobs that the carrier may discontinue pursuant to the provisions of this Award if other employment in any class of engine service, for which they are qualified, is available to them in their respective seniority districts. Such firemen (helpers) will have their seniority rights, existing as of the effective date of this Award, for promotion in their turn, preserved.

D(3). Extra lists shall be adjusted and firemen (helpers) shall be furloughed and recalled pursuant to the provisions of rules in effect as of the day before the day this Award becomes effective, as modified by and subject to the provisions of this Award; provided, that the carrier shall not be required to use firemen (helpers) covered by paragraph D(2) of this Award in freight or yard crews, other than in crews designated by the local chairmen pursuant to the provisions of paragraphs B(2) and B(3), if the services of such employees are required on the extra list to fill vacancies in crews or positions where firemen (helpers) must be used, as in passenger service or under the provisions of this Award.

D(4). Firemen (helpers) retained in service under the conditions set forth in Parts C and D of this Award, when assigned to the extra lists for firemen (helpers), shall not be called to fill vacancies in crews in freight and yard service which have not been designated by the local chairmen pursuant to the provisions of paragraphs B(2) and B(3) of this Award if and when their services are required to fill temporary vacancies as locomotive engineers, or temporary vacancies for firemen (helpers) in passenger service, or temporary vacancies for firemen (helpers) in crews designated by the local chairmen as provided in paragraphs B(2) and B(3) of this Award.

Part E—Continuing Study

E(1). Within 30 days following the effective date of this Award, the parties shall establish a National Joint Board charged with responsibility for making an intensive and continuing study of the experience in road freight and yard service with and without the employment of firemen (helpers) during the period that this Award remains in effect. During the 3-month period before the date this Award is due to expire, the National Joint Board shall prepare and issue to the parties a report based on its study.

E(2). The National Joint Board established in paragraph E(1) shall consist of 4 members, of whom 2 shall be selected by the carriers, and one each by the Brotherhood of Locomotive Firemen and Enginemen, and by the Brotherhood of Locomotive Engineers. The expenses of the Board shall be borne by the participating parties.

III. Consist of Road and Yard Crews (Other Than Engine Service)

Part A—Basic Provisions

A(1). The issue of crew consist (other than engine service) shall be remanded to the local properties for negotiation. Pending the consummation of local agreements disposing of the issue, the following provisions shall govern the use of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, and flagmen) employed in all classes of road service, including all miscellaneous and unclassified services, and the use of brakemen or helpers employed in all classes of yard, transfer, and belt line service, including all miscellaneous yard services.

A(2). No change shall be made in the scope or application of rules in effect immediately prior to the effective date of this Award, whether established by agreement, interpretation, or practice, which require a stipulated num-

ber of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, or flagmen) in any class of road service, including all miscellaneous and unclassified services, or which require a stipulated number of brakemen or helpers in any class of yard, transfer, or belt line service, including all miscellaneous yard services, except by agreement, or pursuant to the provisions of this Award.

A(3). Either party in interest shall give written notice of any proposed change in any such stipulated number of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, or flagmen) used in any class of road service, including all miscellaneous and unclassified services, in the following categories:

(a) branch lines, including the use of main lines where necessary to reach initial or final terminals of the branch line train; and

(b) road service where existing rule, practice, or interpretation now requires the employment of more or less than 2 trainmen;

and of any proposed change in any such stipulated number of brakemen or helpers used in any class of yard, transfer, or belt line service, including all miscellaneous yard service. The parties in interest, as that term is used in this Award, shall include only the carrier and the organization representing the class or craft of employees holding seniority rights to the position or positions proposed to be abolished or created in the seniority district or districts in which such changes are proposed. The time and place for the beginning of conferences between the representatives of the parties in interest with respect to such proposed change or changes shall be agreed upon within 10 days after the receipt of said notice, and said time shall be within 15 days after the receipt of said notice.

Part B—Review Procedures

B(1). If no agreement is reached between the parties as to the application of the guidelines enumerated in Part C of this Award, the dispute limited to the application of such guidelines as related to the issue involved may be referred by either party to a special board of adjustment.

B(2). Such special board of adjustment shall be chosen in the following manner:

(a) Each party in interest shall name one member within 10 days after notice has been given that the dispute will be referred to such special board of adjustment; and the two partisan members, so chosen, within 10 days after the date of the selection of the second partisan member, shall name the neutral member, who shall be chairman of the board. If the members chosen by the parties shall fail to name the neutral member of the board within 10 days, the National Mediation Board shall be requested to name such member within 5 days after receipt of such request.

(b) If either party fails to name a member of the board within the 10 days provided in paragraph B(2)(a) of this Award, the National Mediation Board shall be requested to name such member in lieu of such party and shall also name the neutral member necessary to constitute a board of 3 members, all within 5 days after the receipt of such request.

B(3). Decisions of the special board of adjustment shall be rendered within 60 days after the apopintment of the neutral member. A decision of the majority of the board shall be binding upon both parties. The parties shall assume the costs and expenses of their respective representatives. The costs and expenses of the neutral member and any incidental expenses shall be shared equally by the parties unless different arrangements can be made by mutual agreement.

Part C—Guidelines

C(1). The special board of adjustment in making its decisions shall be governed by the following general considerations, and, where applicable, particular considerations, although none of these factors alone shall be controlling of the board's decisions.

C(2). General considerations.

(a) Assurance of adequate safety.

(b) Avoidance of unreasonable burden or workload on members of the crew.

(c) Changes in operating conditions, including density of traffic.

(d) Practices regarding the consist of crews in comparable situations where such practices are not in dispute.

(e) Special conditions which exist on any particular assignment.

(f) Duties required in compliance with the carrier's operating rules and instructions applicable to the crew in question.

(g) Physical characteristics of the line to be traversed and in the areas where switching or industrial work is to be performed (including grade and general climatic conditions).

(h) The number of highway, street, road, railroad, or other crossings or intersections to be protected.

(i) State, county, or municipal regulations applicable with respect to highway, street, road, railroad, or other crossings or intersections.

(j) Availability and use of communication equipment (such as, but not limited to, end-to-end train radio, train to way-side radio, and walkie-talkies).

(k) The presence or absence of a fireman in the engine service crew.

C(3). Particular considerations—passenger road service.

(a) The amount of baggage and storage mail to be handled on and off the train at intermediate stations by the train crew.

(b) The number of passenger cars handled in the train and passenger count.

(c) The method of handling passenger transportation (tickets).

(d) The number of passengers boarding and leaving the train at intermediate stations.

(e) Duties required other than the above on any particular assignment.

C(4). Particular considerations—freight service, including miscellaneous and unclassified services.

(a) The amount and nature of work to be performed en route.

(b) The length of train, in context with the amount and nature of work to be performed en route.

(c) Time limitations applicable to the particular assignment.

C(5). Particular considerations—yard, transfer, and belt line service, including all miscellaneous yard services.

(a) The amount and nature of the work to be performed.

(b) Volume of work considered in context with applicable service time limitations.

Part D—Employee Protection

D(1). Road trainmen and yard brakemen or helpers, other than those on furlough on the date that this Award becomes effective, shall be known and designated, for the purposes of this Award, as "protected employees."

D(2). A "protected employee," known and designated as provided in paragraph D(1) of this Award, shall retain his rights to and obligations to protect road and yard service assignments (including all assignments in miscellaneous and unclassified road services and all assignments in transfer, belt line, and miscellaneous yard services) for which he is qualified, as provided by rules in effect on the day preceding the day this Award becomes effective, to the extent that such positions are available to him in his seniority district, unless and until retired, discharged for cause, or otherwise removed from the carrier's active working lists of road trainmen and yard brakemen or helpers by natural attrition; provided, that no such "protected employee" shall have any right to jobs or positions that the carrier may discontinue pursuant to the provisions of this Award if other employment in any such classes of service, for which such employee is qualified, is available to him in his seniority district. If and when the carrier is required to create new jobs or positions for road trainmen or yard brakemen or helpers, pursuant to the provisions of this Award, such positions shall first be filled, to the extent available, by "protected employees" then filling positions which the carriers would otherwise have the right to abolish or eliminate pursuant to the provisions of this Award, before such jobs or positions may be claimed by other employees of the carrier in accordance with their seniority rights.

IV. Duration

This Award shall continue in force for two years from the date it takes effect, unless the parties agree otherwise.

Dated: November 25, 1963

/s/ Benjamin Aaron
Benjamin Aaron
Neutral Member

/s/ James J. Healy
James J. Healy
Neutral Member

/s/ Ralph T. Seward
Ralph T. Seward
Chairman of the Arbitration Board

Concurring:

/s/ Guy W. Knight
Guy W. Knight
Carrier Member

/s/ J. E. Wolfe
J. E. Wolfe
Carrier Member

Dissenting:

H. E. Gilbert
Organization Member

R. H. McDonald
Organization Member

APPENDIX J

STATUTES INVOLVED

Public Law 88-108, 77 Stat. 132:

Whereas the labor dispute between the carriers represented by the Eastern, Western, and Southeastern Carriers' Conference Committees and certain of their employees represented by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America, labor organizations, threatens essential transportation services of the Nation; and

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained; and

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not resulted in settlement of the dispute; and

Whereas the Congress finds that emergency measures are essential to security and continuity of transportation services by such carriers; and

Whereas it is desirable to achieve the above objectives in a manner which preserves and prefers solutions reached through collective bargaining; and

Whereas, on August 2, 1963, the Secretary of Labor submitted to the carrier and organization representatives certain suggestions as a basis of negotiation for disposition of the firemen (helper) and crew consist issues in the dispute and thereupon through such negotiations tentative agreement was reached with respect to portions of such suggestions; and

Whereas, on August 16, 1963, the carrier parties to the dispute accepted and the organization parties to the dis-

pute accepted with certain reservations the Secretary of Labor's suggestion that the fireman (helper) and crew consist issues be resolved by binding arbitration but the said parties have been unable to agree upon the terms and procedures of an arbitration agreement: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That no carrier which served the notices of November 2, 1959, and no labor organization which received such notices or served the labor organization notices of September 7, 1960, shall make any change except by agreement, or pursuant to an arbitration award as hereinafter provided, in rates of pay, rules, or working conditions encompassed by any such notices, or engage in any strike or lockout over any dispute arising from any of such notices. Any action heretofore taken which would be prohibited by the foregoing sentence shall be forthwith rescinded and the status existing immediately prior to such action restored.

SEC. 2. There is hereby established an arbitration board to consist of seven members. The representatives of the carrier and organization parties to the aforesaid dispute are hereby directed, respectively, within five days after the enactment hereof each to name two persons to serve as members of such arbitration board. The four members thus chosen shall select three additional members. The seven members shall then elect a chairman. If the members chosen by the parties shall fail to name one or more of the additional three members within ten days, such additional members shall be named by the President. If either party fails to name a member or members to the arbitration board within the five days provided, the President shall name such member or members in lieu of such party and shall also name the additional three members necessary to constitute a board of seven members, all within ten days after the date of enactment of this joint resolution. Not-

withstanding any other provision of law, the National Mediation Board is authorized and directed: (1) to compensate the arbitrators not named by the parties at a rate not in excess of $100 for each day together with necessary travel and subsistence expenses, and (2) to provide such services and facilities as may be necessary and appropriate in carrying out the purposes of this joint resolution.

SEC. 3. Promptly upon the completion of the naming of the arbitration board the Secretary of Labor shall furnish to the board and to the parties to the dispute copies of his statement to the parties of August 2, 1963, and the papers therewith submitted to the parties, together with memorandums and such other data as the board may request setting forth the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement. The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve the matters on which the parties were not in agreement, and shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration.

SEC. 4. To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act. The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed, and the arbitration board shall report to the National Mediation Board in the same manner as arbitration boards functioning pursuant to the Railway Labor Act. The award shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise.

SEC. 5. The arbitration board shall begin its hearings thirty days after the enactment of this joint resolution or on such earlier date as the parties to the dispute and the board may agree upon and shall make and file its award not later than ninety days after the enactment of this joint resolution: *Provided, however,* That said award shall not become effective until sixty days after the filing of the award.

SEC. 6. The parties to the disputes arising from the aforesaid notices shall immediately resume collective bargaining with respect to all issues raised in the notices of November 2, 1959, and September 7, 1960, not to be disposed of by arbitration under section 3 of this joint resolution and shall exert every reasonable effort to resolve such issues by agreement. The Secretary of Labor and the National Mediation Board are hereby directed to give all reasonable assistance to the parties and to engage in mediatory action directed toward promoting such agreement.

SEC. 7. (a) In making any award under this joint resolution the arbitration board established under section 2 shall give due consideration to the effect of the proposed award upon adequate and safe transportation service to the public

and upon the interets of the carrier and employees affected, giving due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation.

(b) The obligations imposed by this joint resolution, upon suit by the Attorney General, shall be enforcible through such orders as may be necessary by any court of the United States having jurisdiction of any of the parties.

SEC. 8. This joint resolution shall expire one hundred and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence.

SEC. 9. If any provision of this joint resolution or the application thereof is held invalid, the remainder of this joint resolution and the application of such provision to other parties or in other circumstances not held invalid shall not be affected thereby.

Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. 151, et seq.

* * *

FUNCTIONS OF MEDIATION BOARD

SECTION 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in Section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

* * *

SECTION 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed

after termination of conferences without request for or proffer of the services of the Mediation Board.

ARBITRATION

SEC. 7. First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.

Second. Such board of arbitration shall be chosen in the following manner:

(a) In the case of a board of three, the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name one arbitrator; the two arbitrators thus chosen shall select a third arbitrator. If the arbitrators chosen by the parties shall fail to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the Mediation Board.

(b) In the case of a board of six, the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators; the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators. If the arbitrators chosen by the parties shall fail to name the two arbitrators within fifteen days after their first meeting, the said two arbitrators, or as many of them as have not been named, shall be named by the Mediation Board.

Third. (a) When the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators, they shall notify the Mediation Board, and, in the event of their failure to agree upon any or upon all of the necessary arbitrators within the period fixed by this Act, they shall, at the expiration of such period, notify the Mediation Board of the arbitrators selected, if any, or of their failure to make or complete such selection.

(b) The board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings: *Provided, however,* That the board of arbitration shall be bound to give the parties to the controversy a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel, or by other representatives as they may respectively elect.

(c) Upon notice from the Mediation Board that the parties, or either party, to an arbitration desire the reconvening of the board of arbitration (or a subcommittee of such board of arbitration appointed for such purpose pursuant to the agreement to arbitrate) to pass upon any controversy over the meaning or application of their award, the board, or its subcommittee, shall at once reconvene. No question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommittee.

Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed in the same district court clerk's office, as the original award and become a part thereof.

(d) No arbitrator, except those chosen by the Mediation Board, shall be incompetent to act as an arbitrator because

of his interest in the controversy to be arbitrated, or because of his connection with or partiality to either of the parties to the arbitration.

(e) Each member of any board of arbitration created under the provisions of this Act named by either party to the arbitration shall be compensated by the party naming him. Each arbitrator selected by the arbitrators or named by the Mediation Board shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, while serving as an arbitrator.

(f) The board of arbitration shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as hereinafter provided. The said board shall also furnish a certified copy of its award, and the papers and proceedings, including testimony relating thereto, to the Mediation Board, to be filed in its office; and in addition a certified copy of its award shall be filed in the office of the Intertsate Commerce Commission: *Provided, however,* That such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Commerce Commission, under the Interstate Commerce Act, as amended.

(g) A board of arbitration may, subject to the approval of the Mediation Board, employ and fix the compensation of such assistants as it deems necessary in carrying on the arbitration proceedings. The compensation of such employees, together with their necessary traveling expenses and expenses actually incurred for subsistence, while so

employed, and the necessary expenses of boards of arbitration, shall be paid by the Mediation Board.

Whenever practicable, the board shall be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may conduct its proceedings or deliberations.

(h) All testimony before said board shall be given under oath or affirmation, and any member of the board shall have the power to administer oaths or affirmations. The board of arbitration, or any member thereof, shall have the power to require the attendance of witnesses and the production of such books, papers, contracts, agreements, and documents as may be deemed by the board of arbitration material to a just determination of the matters submitted to its arbitration, and may for that purpose request the clerk of the district court of the United States for the district wherein said arbitration is being conducted to issue the necessary subpoenas, and upon such request the said clerk or his duly authorized deputy shall be, and he hereby is, authorized, and it shall be his duty, to issue such subpoenas. In the event of the failure of any person to comply with such subpoena, or in the event of the contumacy of any witness appearing before the board of arbitration, the board may invoke the aid of the United States courts to compel witnesses to attend and testify and to produce such books, papers, contracts, agreements, and documents to the same extent and under the same conditions and penalties as provided for in the Act to regulate commerce approved February 4, 1887, and the amendments thereto.

Any witness appearing before a board of arbitration shall receive the same fees and mileage as witnesses in courts of the United States, to be paid by the party securing the subpoena.

SEC. 8. The agreement to arbitrate—

(a) Shall be in writing;

(b) Shall stipulate that the arbitration is had under the provisions of this Act;

(c) Shall state whether the board of arbitration is to consist of three or six members;

(d) Shall be signed by the duly accredited representatives of the carrier or carriers and the employees, parties respectively to the agreement to arbitrate, and shall be acknowledged by said parties before a notary public, the clerk of a district court or circuit court of appeals of the United States, or before a member of the Mediation Board, and, when so acknowledged, shall be filed in the office of the Mediation Board;

(e) Shall state specifically the questions to be submitted to the said board for decision; and that, in its award or awards, the said board shall confine itself strictly to decisions as to the questions so specifically submitted to it;

(f) Shall provide that the questions, or any one or more of them, submitted by the parties to the board of arbitration may be withdrawn from arbitration on notice to that effect signed by the duly accredited representatives of all the parties and served on the board of arbitration;

(g) Shall stipulate that the signatures of a majority of said board of arbitration affixed to their award shall be competent to constitute a valid and binding award;

(h) Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board (as provided for in the agreement) within which the said board shall commence its hearings;

(i) Shall fix a period from the beginning of the hearings within which the said board shall make and file its award:

Provided, That the parties may agree at any time upon an extension of this period;

(j) Shall provide for the date from which the award shall become effective and shall fix the period during which the award shall continue in force;

(k) Shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arose or the arbitration was entered into, which district shall be designated in the agreement; and, when so filed, such award and proceedings shall constitute the full and complete record of the arbitration;

(l) Shall provide that the award, when so filed, shall be final and conclusive upon the parties as to the facts determined by said award and as to the merits of the controversy decided;

(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award; and

(n) Shall provide that the respective parties to the award will each faithfully execute the same.

The said agreement to arbitrate, when properly signed and acknowledged as herein provided, shall not be revoked by a party to such agreement: *Provided however,* That such agreement to arbitrate may at any time be revoked and canceled by the written agreement of both parties, signed by

their duly accredited representatives, and (if no board of arbitration has yet been constituted under the agreement) delivered to the Mediation Board or any member thereof; or, if the board of arbitration has been constituted as provided by this Act, delivered to such board of arbitration.

SEC. 9. First. The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Second. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: *Provided, however,* That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board,

or subcommittee thereof, for interpretation, as provided by this Act: *Provided further,* That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

Fourth. If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall determine that a part of the award is valid, the court shall set aside the entire award: *Provided, however,* That, if the parties shall agree thereto, and if such valid and invalid parts are separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

Fifth. At the expiration of ten days from the decision of the district court upon the petition filed as a foresaid, final judgment shall be entered in accordance with said decision, unless during said ten days either party shall appeal therefrom to the circuit court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided.

Sixth. The determination of said circuit court of appeals upon said questions shall be final, and being certified by the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

Seventh. If the petitioner's contentions are finally sustained, judgment shall be entered setting aside the award in whole or, if the parties so agree, in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

Eighth. Nothing in this Act shall be a construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor or service by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

* * *

Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 101 et seq.

SECTION 1. No court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

* * *

SECTION 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any

strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

* * *

SECTION 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the

threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complaintant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a

reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

SECTION 8. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

SECTION 9. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 861

BROTHERHOOD OF RAILROAD TRAINMEN,
SWITCHMEN'S UNION OF NORTH AMERICA, *Petitioners*

v.

THE AKRON & BARBERTON BELT RAILROAD COMPANY,
ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MILTON KRAMER
LESTER P. SCHOENE
MARTIN W. FINGERHUT
Attorneys for Petitioners

SCHOENE and KRAMER
1625 K Street, N.W.
Washington, D. C. 20006

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TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	4
Statement	4
Reasons for Granting the Writ	10
I. The question of the work rules to be in effect upon the expiration of the Award of Arbitration Board No. 282 involves an important issue affecting the employment rights of thousands of persons and which was decided erroneously by the Court below	10
II. Whether parties subject to the Railway Labor Act may effectually make agreements of limited duration presents an important question of the construction of the Railway Labor Act which ought to be decided by this Court	14
III. The Court below was clearly in error in holding that the Award of Arbitration Board No. 282 did not expire at the end of January 24, 1966	18
IV. The Court below was clearly in error in holding that the correspondence between the Richmond, Fredericksburg & Potomac Railroad Company and the Brotherhood of Railroad Trainmen constituted a crew-consist agreement of the same duration as an award of a special board of adjustment	22
Conclusion	24
Appendices (contained in a separate document):	
Appendix A (District Court Opinion of March 3, 1966)	2a
Appendix B (District Court Opinion of March 28, 1966)	16a
Appendix C (District Court Opinion of April 19, 1966)	25a

Page

Appendix D (District Court Opinion of May 19, 1966) 30a

Appendix E (Court of Appeals Opinion of May 12, 1967) 33a

Appendix F (Court of Appeals Opinion of July 31, 1967) 75a

Appendix G (Court of Appeals Judgment of July 31, 1967) 91a

Appendix H (Court of Appeals Memorandum and Order of September 21, 1967) 92a

Appendix I (Award of Arbitration Board No. 282) 95a

Appendix J (Statutes Involved) 111a

TABLE OF CITATIONS

CASES:

Brotherhood of Locomotive Engineers v. Chicago, Rock Island and Pacific R.R., 382 U.S. 423 (1966) 11

Brotherhood of Locomotive Firemen and Enginemen, et al. v. Chicago, Burlington & Quincy R.R., et al., 255 F. Supp. 11 (D.D.C. 1964) aff'd. 331 F. 2d 1020 (D.C. Cir. 1964), cert. den. 377 U.S. 918 .. 4

STATUTES:

28 U.S.C. § 1254(1) 2

Public Law 88-108, 77 Stat. 132 .....*passim*
Section 1 5
Section 2 5
Section 4 .....5, 11
Section 5 ..... 5, 7
Section 8 5

Railway Labor Act, 45 U.S.C. §§ 151-164
Section 6 .....3, 4, 16, 17
Section 10 5

MISCELLANEOUS:

Hearings Before the Committee on Commerce, U.S. Senate, 89th Cong., 1st Sess., On the Administration of Public Law 88-108 10

IN THE

Supreme Court of the United States

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v.

THE AKRON & BARBERTON BELT RAILROAD COMPANY,
ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioners, Brotherhood of Railroad Trainmen and the Switchmen's Union of North America, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on July 31, 1967.[1]

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[1] The opinions and judgment of the Court of Appeals encompassed a number of cases pending before that Court, involving the parties to this petition in some cases, and other parties in other cases, and involving related questions. This petition seeks review of the judgment of the Court of Appeals in the case designated by that Court as Appeal No. 20,152.

OPINIONS BELOW

The opinions of the District Court (Appendices A and B)[2] are reported at 250 F. Supp. 691 and 252 F. Supp. 207. The opinion and supplemental opinion of the Court of Appeals (Appendices E and F) have not yet been officially reported.[3] They are unofficially reported at 65 LRRM 2229 and 65 LRRM 2995.

JURISDICTION

The judgment of the Court of Appeals (Appendix G) was dated and entered on July 31, 1967. On October 16, 1967, the time for filing this petition was extended to November 28, 1967 by order of this Court. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether rules relating to the manning of train crews in road and yard service (commonly known as "crew consist" rules), which were established by or pursuant to the Award of Arbitration Board No. 282 convened under Public Law 88-108, or by agreements entered into during the period of the Award which specified that such rules were to remain in effect to the same extent and for the same period as rules estab-

---

[2] The appendices to this petition are contained in a separate document which has been filed in this Court in common by three of the parties filing petitions for writ of certiorari to review the judgment of the Court below.

[3] On September 21, 1967, the Court of Appeals issued a third opinion. (Appendix H) It is unofficially reported at 66 LRRM 2268. Although it nominally refers only to the appeals involving the Brotherhood of Locomotive Firemen and Enginemen, it is pertinent also to the case of the Petitioners.

lished pursuant to the Award, continue in effect after the expiration of the Award notwithstanding the language of Public Law 88-108 that the award of the arbitration board was to continue in force for a period "not to exceed two years from the date the award takes effect", notwithstanding the legislative history of that Act which shows the Congressional intent that the rules remain in effect only for two years, and notwithstanding the language of the Award that it was to "continue in force for two years from the date it takes effect."

2. Whether Section 6 of the Railway Labor Act requires that crew-consist rules that were modified pursuant to agreements entered into during the effective period of the Award of Arbitration Board No. 282 and which provided that they were to remain in effect only for a limited specified duration nevertheless continue in effect after the expiration of the specified period.

3. Whether the Award of Arbitration Board No. 282, which became effective with respect to the Petitioners at the expiration of January 24, 1964, and which was to remain in effect for a period "not to exceed two years," terminated at the end of January 24, 1966 or at the end of January 25, 1966, when the starting date did not involve problems of a fraction of a day.

4. Whether the exchange of certain correspondence between one of the Respondent railroads (Richmond, Fredericksburg & Potomac) and one of the Petitioners (Brotherhood of Railroad Trainmen) constituted an agreement establishing a change in prior crew-consist rules, when the parties never agreed on the duration of the agreement.

STATUTES INVOLVED

The pertinent provisions of Public Law 88-108 (77 Stat. 132, 45 U.S.C. § 157 (1966 Supplement)) and the Railway Labor Act (48 Stat. 1185, 45 U.S.C. §§ 151-164) are set forth in Appendix J. The provisions of the Award of Arbitration Board No. 282 are set forth in Appendix I.

STATEMENT

On August 28, 1963, following almost four years of failure by most of the railroads, including the Respondents, and the five operating unions, including the Petitioners, to settle their dispute concerning the manning of trains, Congress enacted Public Law 88-108. The dispute involved, *inter alia,* two separate manning issues. The first issue concerned the use of firemen (helpers) on diesel locomotives (R 4); and the second issue concerned the consist of train crews in road and yard service. (R 3) It is the latter issue that involved employees represented by the Petitioner.

The history of the crew-consist dispute is set forth in detail in *Brotherhood of Locomotive Firemen and Enginemen, et al.* v. *Chicago, Burlington & Quincy R.R., et al.,* 255 F. Supp. 11 (D.D.C., 1964), *aff'd.* 331 F. 2d 1020 (D.C. Cir. 1964), *cert. den.* 377 U.S. 918. In brief, on November 2, 1959, most of the railroads in the country served notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156) of their intent to abolish all rules concerning crew consist and on September 7, 1960, the unions served counter Section 6 notices proposing different crew-consist rules. The dispute was not settled by negotiations between the parties either locally or on the national level. (R 4-5) Thereafter, spanning a period of several years, a Pres-

idential Railroad Commission was appointed by the President of the United States to investigate and report on the controversy, the mediatory services of the National Mediation Board were invoked and exhausted, and the President of the United States, acting under Section 10 of the Railway Labor Act (45 U.S.C. Section 160), appointed an Emergency Board to investigate and report concerning the dispute. (R 5) No agreement was reached. The matter came to a head in July and August 1963 when the railroads announced that they intended unilaterally to put in effect the proposal in their November 2, 1959 notices and the unions announced that a strike would be called if the railroads did so. (R 21) To prevent such unilateral action by the railroads and its consequent strike by the unions, Public Law 88-108 was enacted. (R 21; Appendix J.)

Section 1 declared that neither the railroads nor the unions could make any changes in the status quo except by agreement or pursuant to the arbitration award provided for in the Act as to any matters which were the subject of the Section 6 notices of November 2, 1959 and September 7, 1960.

Section 2 of P.L. 88-108 provided for the creation of an arbitration board. Section 4 provided that its award was to continue in force for such period as the arbitration board should determine in its award, "but not to exceed two years from the date the award takes effect, unless the parties agree otherwise." Section 5 of the Act provided that the award was to become effective 60 days after filing the award.

Section 8 provided that the Act would expire 180 days after its enactment, except that it would remain in effect with respect to the last sentence of Section 4 (which dealt with the duration of the arbitration award) for

the period prescribed in that sentence (i.e., "not to exceed two years from the date the award takes effect, unless the parties agree otherwise.")

Pursuant to the provisions of P.L. 88-108, a board of arbitration was convened, which became known as Arbitration Board No. 282. The Board issued its Award on November 26, 1963. (R 41; Appendix I) Section I of the Award provided that its determination with respect to the crew-consist issue was to be a full disposition of the issue of crew consist involved in the parties' Section 6 notices of November 2, 1959 and September 7, 1960. Section II concerned the disposition of the issue concerning the use of firemen (helpers) on other than steam power locomotives.

Section III of the Award dealt with the crew-consist dispute. Section III A(1) remanded the crew-consist issue to the parties for negotiations on the local properties but pending the consummation of local agreements provided that certain interim rules should apply.

Section III A(3) provided that either party could give notice to the other of any proposed change in the preexisting crew-consist rules, and that following such notice the parties were thereafter to meet in an attempt to reach agreement on the notice. Section III Part B(1) provided that if no agreement was reached the issue involved could be referred by either party to a "special board of adjustment". Section III Part B(3) provided that the determination by the special board of the dispute was to be binding on the parties.

Section IV of the Award provided that the Award was to "continue in force for two years from the date it takes effect, unless the parties agree otherwise." Arbitration Board No. 282 filed its Award on November

26, 1963, and in accordance with Section 5 of P.L. 88-108, the Award became effective commencing with January 25, 1964. (R 9)

Utilizing Section III of the Award, almost all the Respondents served notices on the Petitioners of their proposed changes in the preexisting crew-consist rules. Negotiations were conducted on the local properties and in many instances agreements were reached. These agreements varied with respect to the duration of the agreements. (R 65-70) In many other instances agreement was not reached and the disputes were referred to special boards of adjustment, as provided in Section III of the Award, and awards were issued. (R 62)

On January 19, 1966, 178 railroads[4] filed a complaint for declaratory judgment and injunctive relief against the Petitioners and the Order of Railway Conductors and Brakemen requesting the District Court to declare that the rules and procedures established by or pursuant to the Award of Arbitration Board No. 282, whether by way of awards of special boards or through agreements, continued in effect upon the termination of the Award until changed by agreement or until the procedures provided by the Railway Labor Act have been exhausted with respect to notices proposing changes in such rules and procedures. (R 2-17) On February 16, 1966 the Petitioners filed their Answer and Counterclaim in which they requested the Court to declare that the rules which were modified by or pursuant to the Award were again in effect upon the termination of the Award.

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[4] On February 3, 1966, the railroads filed a Notice of Dismissal by Certain Plaintiffs dismissing the action with respect to 33 of the railroads. (R 17)

On March 3, 1966 the District Court delivered its first opinion. (R 153-167; Appendix A) The Court held that upon the termination of the Award no further proceedings could be taken under the Award. However, the Court held that rules established under the Award created a "new plateau" and that such rules continued in effect following the termination of the Award.

On March 25, 1966 a final hearing was held. The purpose of the hearing was to determine the application of the Court's March 3, 1966 rulings to specific situations, such as the effect of the termination of the Award on agreements entered into during the period of the Award and on proceedings initiated before the termination of the Award but not completed at the time the Award expired. The parties filed an extensive Stipulation As To Facts, together with exhibits, and no further evidence was introduced. (R 62-111) On March 28, 1966, the District Court rendered its oral opinion with respect to these remaining issues (R 167-174; Appendix B), and on April 6, 1966 entered judgment with respect to all issues. (R 175-181)

The District Court found that the rules established pursuant to the awards of special boards of adjustment continued in effect upon the expiration of the Award, and that, with the exception of three agreements, all agreements made during the period of the Award were to be treated as if they were awards of special boards of adjustment and the agreements also continued in effect upon the expiration of the agreements. The District Court further held that the Award expired at the end of January 25, 1966 solely because the parties had on several occasions referred to that date as the expiration date.

The Court of Appeals affirmed the holdings of the District Court set forth above. It based its legal underpinning that the rules created by the awards of special boards and the agreements of limited duration continued in effect upon the expiration of the Award of Arbitration Board No. 282 and the expiration of the agreements "not [on] the Joint Resolution which expired after 180 days of life," not "on the Award, which had only a 2-year life," and not because of "any agreement of the parties." (App. p. 45a) Rather, the Court's rationale was that the Railway Labor Act required such result. The Court stated (App. p. 45a):

> "The mandate of the Railway Labor Act requires that the work rules in effect on any particular day shall also be in effect the following day—beyond the power of either party to institute a unilateral modification—subject to change only in accordance with the procedures prescribed by the Act. . . . This new-plateau reasoning applies even though the work rules are established by agreements of limited duration. . . . It likewise applies even though the work rules are established by an arbitration award of limited duration."

With respect to the issue of the date the Award expired, the Court of Appeals, in its first Opinion (App. p. 40a), reversed the District Court and held that the Award expired at the end of January 24, 1966. In its Supplemental Opinion, however, the Court of Appeals reversed itself and found that the Award expired at the end of January 25, 1966. (App. p. 86a) The Court explained its earlier ruling that the Award expired January 24, 1966, on the ground that the starting date of the Award did not involve the problem of a fractional day. The Court concluded, however, that it felt compelled to reject its own reasoning because of a "horn-

book learning to the effect that where there is doubtful language in a statute the courts prefer that will confirm rather than destroy any bona fide transaction or title," and that since a special board of adjustment rendered an award on January 25, 1966, its construction should be given effect (App. p. 85a) without there being any indication that the special board had given any construction or any consideration to the "two years" provision.

REASONS FOR GRANTING THE WRIT

I. The question of the work rules to be in effect upon the expiration of the Award of Arbitration Board No. 282 involves an important issue affecting the employment rights of thousands of persons and which was decided erroneously by the Court below.

Utilizing the provisions of the Award of Arbitration Board No. 282, the Respondents, within the space of two years, and with a zeal unimagined by Arbitration Board No. 282,[5] extinguished the employment rights of 18,000 employees under the part of the Award dealing with the use of firemen (helpers) on diesel locomotives, and received authorization to discontinue approximately 7,574 job assignments under the part of the Award dealing with crew consist. (R 142)

The Petitioners contended in the Court below that based upon the language of Public Law 88-108, its legislative history, the language of the Award of Arbitration Board No. 282, and a decision of this Court, the only conclusion that could be drawn was that both the Congress and the Arbitration Board intended that the work rules created by or pursuant to the Award

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[5] Testimony of Ralph T. Seward, Chairman of Arbitration Board No. 282, in Hearing Before the Committee on Commerce, U.S. Senate, 89th Cong., 1st Sess., *On the Administration of Public Law 88-108*, pp. 363-364.

were to be interim rules only and were intended to remain in effect only for the period that the Award was effective and that upon the expiration of the Award the prior agreed-to rules that were modified by the Award were automatically again in effect, absent agreement to the contrary.

The Petitioners pointed to the language of Section 4 of Public Law 88-108 which provided (App. p. 114a):

> "The award shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise."

And to Section IV of the Award of Arbitration Board No. 282 which provided (App. p. 110a):

> "This Award shall continue in force for two years from the date it takes effect, unless the parties agree otherwise."

The Petitioners also cited numerous statements of representatives of the Administration proposing the legislation and the parties to the dispute taken from testimony given at the hearings before the House and Senate committees considering the legislation that became Public Law 88-108, the reports of the Senate and House committees reporting the bill, and numerous statements of members of the Congress during the floor debates on the legislation, all to the effect that the work rules created pursuant to the legislation would continue in effect only for a two-year period at the most.

Finally, the Petitioners cited the opinion of this Court in *Bhd. of Locomotive Engineers* v. *Chicago, R.I. & P.R.R.*, 382 U.S. 423 (1966), wherein this Court,

in discussing the Award of Arbitration Board No. 282, stated (at 433):

> "Their award was to be a complete and final disposition of these issues for a period not exceeding two years from the date the award would take effect . . . .
>
> ". . . Congress wanted to do as little as possible in solving the dispute which was before it . . . ."

Notwithstanding all the evidence to the contrary, the Court of Appeals rejected the position of Petitioners on the ground that the legislative history was unclear on the subject. The Court referred to no provision of Public Law 88-108, the Award, or to any legislative history, to support its conclusion that there was doubt of the intent of Congress or the Arbitration Board as to the maximum period the rules created pursuant to the Award would be in effect. Indeed, the Court conceded that the approach of the Petitioners:

> "has a kind of formal logic, and certain provisions of Public Law 88-108 could be read this way." (App. p. 45a)

The Court made no attempt to reconcile its holding that the work rules established by the Award were to be controlling for a *minimum* period of two years and that the rules thus established created a "new plateau" which was to continue upon the expiration of the Award, with the clear mandate of Congress that the Award was to remain in effect for a period "not to exceed two years", or with the Award which provided that it was to "continue in force for two years from the date it takes effect."

We are aware that a petition for certiorari is not the proper place for a detailed argument on the merits. For this reason we have omitted the numerous references to the legislative history of Public Law 88-108

which support our position. Our purpose here is only to show that there is at least a serious doubt that the Court of Appeals was correct in its construction of the statute and the Award. When such doubt is coupled with the great impact such determination had upon the employment rights of thousands of persons, we believe such determination is the proper subject of review by this Court.

We further submit that review is necessary because the Court of Appeals itself was not at all sure of the correctness of its determinations. The confusion and uncertainty of the Court below is apparent from the fact that the Court found it necessary to issue from time to time three separate opinions. The first opinion (Appendix E), of 41 pages, concluded with the unusual direction that the parties submit proposed judgments to the Court of Appeals with leave to the parties to "request supplemental rulings on any matters that have not been discussed in this opinion."

The result of this unusual request was a second opinion (Appendix F), of 19 pages, containing clarifications of prior rulings, a reversal of at least one ruling made in the first opinion which in turn had reversed a ruling of the District Court, and rulings on several additional matters not mentioned in the first opinion. These two opinions, however, still were found insufficient to resolve the matter and a third opinion issued. (Appendix H.)

In this final opinion, if indeed it be the final opinion, the Court practically conceded that it was uncertain whether its prior decisions were correct, and, in effect, invited Arbitration Board No. 282 to render its opinion with respect to the various rulings of the Court. The Court stated (App. p. 93a.)

> "It is Ordered by the court that the carriers petition of August 15, 1967 is denied, without prej-

udice however to the Board's seeking leave within thirty days from the date of this order to submit as amicus curiae a showing of respects, if any there be, in which the opinions of this court are inconsistent with the understanding of Board 282 as to the proper meaning and applicability of its award."

On September 12, 1967, the National Mediation Board sent telegrams to all persons who had been members of Arbitration Board No. 282 reconvening the Board to "consider what action if any to take in light of the memorandum and order" of the Court of Appeals. On October 19, 1967, Arbitration Board No. 282 advised the Court that it declined to file a brief amicus.

In any event, the correctness of the decision of the Court below adversely affecting such a very large number of persons, should not have been dependent on whether Board 282 agreed with the Court of Appeals' conclusions. The only forum which has the statutory power to review such decisions is this Court, and, we submit, in light of the confusion and uncertainty of the Court below, this Court should exercise such power of review.

II. Whether parties subject to the Railway Labor Act may effectually make agreements of limited duration presents an important question of the construction of the Railway Labor Act which ought to be decided by this Court.

Question No. 2 presents the issue of whether parties subject to the Railway Labor Act may effectually enter into an agreement pursuant to which the agreement will expire on a day certain with its terms no longer to have any force or effect after the expiration date. The Court below held that the parties may not do so effectively and that the consequence of the Railway Labor Act is "to prolong agreements subject to its

provisions regardless of what they say as to termination." (App. p. 46a.)

The issue arose in this case in the following manner. Section III A(3) of the Award of Arbitration Board No. 282 provided that either party to the Award could give notice to the other of any proposed change in the preexisting crew-consist rules and that following such notice the parties were to meet in an attempt to reach agreement on the notice.

Approximately 95 agreements were entered into following such negotiations. The agreements varied considerably with respect to the dates on which they were to terminate. The parties were able to stipulate that, with the exception of 13 agreements, all agreements could be classified within one of five categories. (R 65-66) The instant question is not concerned with the agreements in these categories.

The parties could not agree on a category for the remaining 13 agreements, however, and these were presented individually to the Courts below for consideration.[6] The Petitioners contended, with respect to these

[6] The relevant portions of these agreements are set forth in paragraph F of the Stipulation as to Facts entered into between the parties in the District Court. (R 66-70) Actually, only 10 agreements were presented to the Court of Appeals for adjudication. The District Court upheld the position of the Petitioners with respect to three of the agreements. With respect to these three agreements the District Court held that the prior crew-consist rules again became effective because these agreements "contain an express provision to the effect that upon their expiration the prior rule as to crew consist would again be in full force and effect." The Respondents did not appeal from this ruling. Under the reasoning of the Court of Appeals, however, it may be that if they had appealed, the Court would have reversed the District Court on the ground that a Section 6 notice was required to return to the old rules notwithstanding the express provisions of such agreements to the contrary.

agreements, that each agreement showed the intent of the parties that the crew-consist rules established pursuant to the agreement were intended to be in effect only for the limited period of the agreement and that upon its expiration, the prior agreed-upon crew- consist rules were again to be in effect.

The Court of Appeals rejected the Petitioners' contention holding that Section 6 of the Railway Labor Act superseded the intent of the parties and, regardless of what the parties intended, the agreements continue in effect until the procedures of the Railway Labor Act for changing agreements are resorted to. The Court stated (App. pp. 45a-46a.)

> "The mandate of the Railway Labor Act requires that the work rules in effect on any particular day shall also be in effect the following day—beyond the power of either party to institute a unilateral modification—subject to change only in accordance with the procedures prescribed by the Act. These procedures begin with the notices required by Section 6 to be served by any party seeking a change at least thirty days in advance of the proposed effective date of such change. This new plateau reasoning applies even though the work rules are established by agreements of limited duration. The effect of § 6 is to prolong agreements subject to its provisions regardless of what they say as to termination." [17]

[17] Manning v. American Airlines, Inc. *supra*, note 15, 329 F.2d at 34.

For example, the agreement with the Kansas City Southern provided (R 67-68):

> "This agreement does not affect schedule rules . . . in effect on the day preceding the effective date of this agreement except . . . for the period this agreement remains in effect . . . This agreement . . . shall remain in effect until January 25, 1966 . . . ."

Yet the Court below held that the agreement remained in effect after January 25, 1966 and that the "schedule rules . . . in effect on the day preceding the effective date of" the agreement continued to be modified after January 25, 1966 despite the express agreement of the parties to the contrary.

We submit that the error of the Court of Appeals is evident from its own analysis. Thus, the Court began its analysis by referring to the fact that Section 6 of the Railway Labor Act requires that notice be served whenever a party seeks "to institute a unilateral modification" of an existing agreement. There is no question that the Court below is correct on this point and that a Section 6 notice is required whenever one of the parties to an agreement desires to change the existing collective bargaining agreement. Under such circumstances, a notice is required so that the other party to the agreement is made aware of the proposed change in order that negotiating conferences can be scheduled to discuss the proposal, and so that, if no agreement can be reached on the property, the dispute may be referred by any of the parties to the National Mediation Board for its mediatory services in attempting to settle the dispute.

Immediately following this statement, however, the Court below concluded, from the fact that a notice is required when a "unilateral modification" is intended, that "the effect of § 6 is to prolong agreements subject to its provisions regardless of what they say as to termination."

We fail to find any provision in Section 6 that would require notice to be served when both parties to the agreement state in the agreement that it shall remain

in effect for a certain period, and not thereafter. In such situation, the expiration of the agreement does not constitute a unilateral modification of the agreement but rather the culmination of what the parties had agreed. Here, since the parties to the agreements involved specified that crew-consist rules be in effect only until a specified date, the revival of the rules in effect prior to such agreements is not a *change* in such agreements but is part of such agreements.

III. The Court below clearly was in error in holding that the Award of Arbitration Board No. 282 did not expire at the end of January 24, 1966.

The question of whether the Award of Arbitration Board No. 282 expired at the end of January 25, 1966 is relevant only to two of the Respondents. On January 25, 1966 a special board of adjustment rendered an award with respect to a dispute between the Green Bay and Western Railroad Company, the Kewanee, Green Bay and Western Railroad Company, and the Brotherhood of Railroad Trainmen. (R 63) The Court of Appeals' determination of this issue is, perhaps, the outstanding example of the confused and uncertain handling of this case by that Court.

The District Court had held that the Award of Arbitration Board No. 282 expired at the end of January 25, 1966 and therefore the special board award was valid, simply because the Court and the parties often referred to the Award as expiring on that date. (R 151)

In the first opinion of the Court of Appeals the Court reversed the District Court, noting (App. p. 40a):

> " "The parties and the District Court have all accepted and implemented the Award as effective January 25, 1964. With that date marking the first day of the two year period it is clear that the

> full two-year period expired at the end of January 24, 1966. We see no valid basis for the assumption of the District Judge that the Award was in existence on January 25, 1966."

The Court concluded that the award of the special board issued on January 25, 1966 was invalid.

The Court of Appeals changed its mind in its second opinion, follwoing a request by the Respondents for a rehearing of the issue. The Court pointed out, however, that its reason for reversing itself was not based on any argument put forth by Respondents. The Court stated (App. pp. 84a-85a):

> "On rehearing the carriers point out decisions interpreting statutory provisions that an act be done within a specified period from the date of another action or event so that the initial or trigger date is excluded from the computation . . . .We thought this rule inapplicable because the starting date did not involve problems of a fractional day, and was in turn determined by a still earlier computation beginning with an initial date that was concededly excluded from the computation. This led us to view that the two-year period prescribed by the Act as the life of the Award did not extend beyond 731 full days (two years of 365 days each, plus February 29, 1964) and that the Award which started at 12:01 a.m. on January 25, 1964, should not be stretched to include the 732nd day of January 25, 1966. We felt that in this peculiar setting of this law that legislative consideration should prevail over the customary formula for computing time."

Notwithstanding "legislative consideration" the Court nevertheless found that the special board award was valid. The basis of the decision was (App. p. 85a):

> ". . . hornbook learning to the effect that where there is doubtful language in a statute for per-

formance of an act, the courts prefer that which will confirm rather than destroy any bona fide transaction or title. 52 Am. Jur. *Time* § 18 (1944).

". . . When the special board assumed that it had authority to act on January 25, 1966, it must be presumed to have considered the question carefully and with a view to conforming to the intent of Congress as nearly as it could discern that intent."

There is not a word anywhere to substantiate such presumption.

The Court below took pains to reject the Respondents' contentions, concluding that the effective date of the Award did not involve a fractional day, that the Award should not be stretched to include an additional day, and that legislative consideration should prevail over the customary formula for computing time. It then discarded its entire analysis, finding "doubtful language in a statute." What doubtful language? The careful analysis of the Court shows that there is no doubtful language at all on this subject.

The third opinion of the Court of Appeals shows its uncertainty. In the third opinion, the Court refers to its holding on this point and immediately thereafter orders that its mandate be stayed to permit Board 282 to advise in what respects, if any, "the opinions of this court are inconsistent with the understanding of Board 282 as to the proper meaning and applicability of its award." (App. p. 93a.)

On October 19, 1967, Board 282 advised the Court below that it would not take advantage of the Court's offer. (See p. 14, *supra*. If it had, however, we have no doubt of what it would have had to say on this point. The fact is that Board 282 consistently took the posi-

tion that it would not determine questions of a legal nature concerning the termination date of the Award or the effect of the termination of the Award. For example, on June 9, 1964, Arbitration Board No. 282 rendered a response to a question which had been submitted to it by the Switchmen's Union of North America. The question of SUNA and the answer of Board 282 are, in pertinent part, as follows:

> "Question III. In the event the Carriers serve notice under Caption III Consist of Road and Yard Crews, . . . or if procedures under Part B are not completed or decisions of special boards of adjustment have not been rendered under B-3 on the date Arbitration Board No. 282 terminates:
>
> "Do all procedures terminate on the date the Board terminates?
>
> "Are all decisions which may be rendered by a neutral subsequent to the date the Board terminates void?
>
> "Answer: These questions do not call for an interpretation of the Board's Award. They call for an opinion as to the legal situation which exists following the termination of the Board's Award. The Board therefore lacks jurisdiction to answer them."

Since Board 282 took the position that it did not have jurisdiction to determine questions of a legal nature there can be no doubt that it did not intend that special boards of adjustment deliberate or rule on the matter. The Court below clearly was in error both in presuming that the special board "considered the question carefully," and in giving any weight to the coincidental fact that the award of the special board issued on January 25, 1966.

IV. The Court below was clearly in error in holding that the correspondence between the Richmond, Fredericksburg & Potomac Railroad Company and the Brotherhood of Railroad Trainmen constituted a crew consist agreement of the same duration as an award by a special board of adjustment.

Should this Court decide to review the basic determinations of the Court below, we request this Court to review also the lower Court's holding with respect to the issue involving the Richmond, Fredericksburg & Potomac Railroad Company. ("RF&P") and the Brotherhood of Railroad Trainmen, which holding violates the most fundamental principles of contract law.

The issue is whether certain correspondence between the RF&P and the Brotherhood constituted a crew-consist agreement. The Brotherhood's position is that the correspondence clearly shows that the parties could not agree and no agreement was made. The correspondence was included in the Stipulation as to Facts (R. 80-90).

Although the issue was thoroughly briefed and argued by counsel for the parties, the first opinion of the Court below ignored the issue entirely. The Brotherhood called the Court's attention to this fact and in the Supplemental Opinion of the Court of July 31, 1967, the Court ruled on the issue. The Court held (App. p. 90a, fn. 6) that the correspondence constituted a crew-consist agreement of the same duration as an award by a special board of adjustment. We submit that the holding of the Court below was so clearly in error, that if this Court determines to review any aspect of the case, it should not permit this determination to stand.

The last correspondence on the matter between the RF&P and the Brotherhood plainly shows the gulf

separating the parties and their failure to enter into a binding agreement. On November 9, 1964, the representative of the Brotherhood sent a letter to the RF&P which concluded with the following paragraph (R. 89-90):

> "The effective date of this agreement forced upon us is November 15, 1964, and as far as I am concerned, it expires on January 25, 1966 unless we agree otherwise in accordance with Article IV, Duration of Award Arbitration Board No. 282 and at present I do not agree otherwise."

The RF&P's response is dated November 12, 1964. The carrier's letter states (R. 90):

> "On November 15, 1964, that agreement will be placed in effect with the understanding that there is a difference between the parties on the duration of the agreement. The opinion of the RF&P on the issue of agreement duration is outlined in my letter to you of November 5, 1964, while your opinion is expressed in your letter to me of November 9, 1964.
>
> "As far as the RF&P is concerned this concludes our handling of the subject agreement at this time."

Thus, at the termination of the correspondence the situation existing was that both parties believed that they were making an agreement but not the same agreement. The Brotherhood stated it was making an agreement which by its terms was to expire on January 25, 1966 whereupon the prior crew-consist rules were again to become effective. The RF&P, on the other hand, stated it was making an agreement which would be the same as any other agreement made by the parties which

does not include a specific termination date. This difference persisted through all the correspondence which the Court below found to constitute an agreement.

CONCLUSION

At least some of these issues are of far-reaching effect and apparently decided erroneously by the Court below. It is urged that this petition be granted.

Respectfully submitted,

MILTON KRAMER
LESTER P. SCHOENE
MARTIN W. FINGERHUT
Attorneys for Petitioners

SCHOENE and KRAMER
1625 K Street, N.W.
Washington, D. C. 20006

November, 1967

INDEX

Table of Contents

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statement of the Case	2
Argument	3

Table of Citations

Burnet v. *Willingham L. & T. Co.*, 282 U.S. 437 (1931)	14
Engineers v. *Chicago, R. I. & P. R. Co.*, 382 U.S. 423 (1966)	8
Sheets v. *Selden's Lessee*, 2 Wall. (69 U.S.) 177 (1864)	13
Union National Bank v. *Lamb*, 337 U.S. 38 (1949)	14
Hearings on H. J. Res. 565 before the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess.	6, 7
Hearings on S.J. Res. 102 before the Senate Committee on Commerce, 77th Cong., 1st Sess.	6, 7
Rule 6(a) F. R. Civ. P.	14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 861

BROTHERHOOD OF RAILROAD TRAINMEN, SWITCHMEN'S UNION OF NORTH AMERICA, *Petitioners.*

v.

THE AKRON & BARBERTON BELT RAILROAD COMPANY, *et al., Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS CONCERNING PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinions of the District Court (Appendices A, B and D to Petition) are reported at 250 F. Supp. 691, 252 F. Supp. 207 and 254 F. Supp. 306. The opinions of the Court of Appeals (Appendices E and F to Petition), not yet officially reported, are unofficially reported at 55 CCH Labor Cases ¶ 11,912 and 56 CCH Labor Cases ¶ 12,095.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

1. Upon the expiration of the two-year period in which the Award by Arbitration Board No. 282 "shall continue in force" and in the absence of agreement by the parties as to what crew-consist rules shall apply thereafter, do the modifications which were made in the crew-consist agreements and rules in effect prior to Award 282 by awards of special boards of adjustment or by agreements, pursuant to procedures established by Award 282, continue to apply until changed in accordance with the Railway Labor Act, or do the prior crew-consist agreements and rules automatically revive and apply thereafter until changed in accordance with the Railway Labor Act?

2. With respect to ten of the agreements entered into pursuant to the Award (described in Section F of the Stipulation as to Facts), should they have been construed by the courts below as expressly providing that the prior agreements and rules were to be restored upon the expiration of the Award?

3. Was the last day of the two-year period in which Award 282 "shall continue in force" January 24, 1966 or January 25, 1966?

4. Did the Brotherhood of Railroad Trainmen and the Richmond, Fredericksburg & Potomac Railroad Company enter into an agreement pursuant to procedures established by Award 282?

Statement of the Case

Respondents herein are the petitioners in No. 863, which relates to the same judgment and proceeding below. We respectfully refer the Court to the Statement of the Case in that petition for a more adequate and accurate general description of the relevant facts than is contained in the instant petition. Certain additional facts relevant to the contentions made by petitioners herein are set forth in our Argument.

Argument

The parties stipulated, for purposes of this case, that 83 awards by special boards of adjustment and 92 agreements were brought about during the two-year period of Award 282 pursuant to the procedures for modifying prior crew-consist agreements and rules established by that Award (JA 62-70).[1] Of those 92 agreements, the parties agreed (JA 65) that 43 provided that "they shall continue in effect until changed in accordance with the provisions of the Railway Labor Act," and petitioners have not disputed the fact that those agreements do so continue to apply (JA 23). The parties also agreed that 20 of the agreements pursuant to the Award provide that they "shall continue in effect to the same extent as if they were awards rendered by special boards of adjustment" (JA 65), that 3 provide that they shall continue in effect unless the unions' contention that the prior rules and agreements are automatically revived "is sustained" (JA 65-66), and that 12 "do not contain any provision concerning the period during which the agreement shall continue in force" (JA 66).

In Section F of the Stipulation as to Facts (JA 66-70), the parties described 13 agreements "which either do not come within any of the categories listed above or the parties hereto have been unable to agree upon placing such an agreement in one of the categories listed above" (JA 66). Of those 13, the trial court found (Pet., App. B, at 21a) that three of them expressly provided for restoration of the prior agreements and rules upon the expiration of Award 282. The carriers did not appeal that holding and those three agreements are not in dispute. Finally, an agreement between the Brotherhood of Railroad Trainmen and the Richmond, Fredericksburg & Potomac Railroad Company was embodied in an exchange of correspondence which is

[1] JA references are to the Joint Appendix in No. 20152 below.

set forth in Section G of the Stipulation and the attachments thereto (JA 70, 80-90).

Hence, the basic dispute as to what rules the Congress intended to be applied following the expiration of Award 282 relates to the 83 special board awards and to 46 of the agreements pursuant to Award 282. While we believe that petitioners' contentions in that regard are erroneous, we do not object to a grant of this petition insofar as it raises that issue if the petition in No. 863 also is granted. Petitioners also seek to raise additional issues, involving an interpretation of the language of a particular agreement or other special circumstances, with respect to the 10 disputed agreements described in Section F of the Stipulation, with respect to the agreement with the Richmond, Fredericksburg & Potomac Railroad Company, and with respect to one special board award. We oppose the grant of this petition insofar as it relates to those issues. Our reasons for these positions are set forth below.

1. In the petition filed in No. 863 (pp. 12-27), the carriers demonstrate that the Congress intended the Railway Labor Act to govern the situation following the expiration of Award; while the Court of Appeals (as well as the District Court) agreed with that premise, it fell into error in certain of its interpretations of the Railway Labor Act. In the instant petition (pp. 10-14), the petitioner unions contend that the Congress intended, regardless of the Railway Labor Act, that the prior agreements and rules governing the consist of train crews were to be automatically restored to full effect upon the expiration of the Award, unless the parties expressly agreed otherwise. We believe that the unions' position in this regard is without foundation in P.L. 88-108, in its legislative history, in the Railway Labor Act and in reason, as well as having been rejected by both courts below. We recognize, however, that the Court prob-

ably will not attempt to determine who is right and who is wrong as to that issue upon the basis of the petitions and the responses thereto, as such matters normally are determined only after full briefing and argument. Since we are convinced that the petition in No. 863 presents important issues which should be reviewed by this Court, and in view of the considerations stated above, we do not oppose the grant of the instant petition insofar as it relates to the general issue of what the Congress intended with respect to the situation following the expiration of Award 282, if the petition in No. 863 is granted. That is the issue sought to be stated in Question No. 1 presented (pp. 2-3) in the instant petition, which we have restated as Question No. 1 herein (p. 2, *supra*).

We emphasize, however, our view that there is no support for petitioners' contention that the prior agreements and rules governing the consist of train crews were intended to be restored automatically upon expiration of the Award, unless the parties expressly agreed otherwise. Petitioners rely (Pet., at 11) upon the fact that the Award, under its own terms and as required by P.L. 88-108, expired after two years. But that fact merely poses the issue as to what rules are to govern the consist of train crews after the expiration of the Award; it does not provide the answer to that issue.

Petitioners also state (Pet., at 11) that they cited to the lower courts legislative history of P.L. 88-108, "all to the effect that the work rules created pursuant to the legislation would continue in effect only for a two-year period at the most." That legislative history is not cited or set out in the petition. Insofar as we are aware, no one stated at any time during the consideration by the Congress of P.L. 88-108 either that the modifications in the prior agreements and rules made by or pursuant to Award 282 would have no effect after the expiration of the Award or that such prior

agreements and rules would be restored upon the expiration of the Award.

As we show in the petition filed in No. 863 (at pp. 12-16), the Administration proposed interim regulation by the Interstate Commerce Commission of the issues raised by the 1959 and 1960 Section 6 notices while the parties continued bargaining upon those notices which would remain outstanding. Even under that proposed legislation, the prior agreements and rules would not have to be restored to full effect upon the expiration of the I.C.C. regulations. Rather, if no agreement was reached disposing of the Section 6 notices and in the absence of further legislation, the carriers would have been free to implement their Section 6 notices so as to change the consist of train crews at their discretion and the unions would have been free to strike.

For example, Secretary of Labor Wirtz testified, in response to questions during the committee hearings upon the Administration's bill, as follows:

> "Senator McGee. What happens, again for the record, to an interim rule that expires without any negotiated rule having been made during the 2-year life?
>
> "Secretary Wirtz. And no renewal of the resolution?
>
> "Senator McGee. Yes.
>
> "Secretary Wirtz. It would mean that section 6 notices now in effect would still be standing and that there would be a right of either party to take whatever course of action it wanted at that time." Hearings on S.J. Res. 102 before the Senate Committee on Commerce, 88th Cong., 1st Sess., at 81.

> "Mr. Devine. I think I know the answers to this, but I think it should be made clear in the record. Say all of the gymnastics provided in this bill are gone through and the procedures are followed and the Interstate Commerce Commission makes recommendations,

and let us say the brotherhoods in this instance would not agree to go along with the recommendations. Would they then be free to strike?

"Secretary Wirtz. After the interim rule had been in effect for the 2-year period, then assuming there is no agreement, the situation would be that they would be at that point unless there was further action taken by the Congress." Hearings on H.J. Res. 565 before the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess., at 107.

Secretary Wirtz also agreed that there was "a strong likelihood the President would recommend an extension" of the legislation if the dispute was not settled during the two-year period of I.C.C. regulation, and stated that consideration would be given to calling "a special session of the Congress" if the Congress was not in regular session at that time. Hearings on S.J. Res. 102, *supra* at 55-56, 61. Thus, the President of the Brotherhood of Railroad Trainmen, Mr. Charles Luna, believed that any rules imposed by the I.C.C. would in effect become permanent. He testified that after the end of the two-year period "we would be back here with it" and "[w]e would be stuck with them unless we did settle for them" by agreement. Hearings on H.J. Res. 565, *supra* at 904. The President of the Switchmen's Union of North America, Mr. Neil P. Speirs, agreed. Hearings on S.J. Res. 102, *supra* at 580.

The only interpretation of the Administration's bill contrary to that of Secretary Wirtz was given by counsel for one of the other unions, who thought that the I.C.C. rules would remain in effect after the two-year period but would then be subject to change under the Railway Labor Act. Hearings on H.J. Res. 565, *supra* at 682. No one suggested that the prior agreements and rules would have to be automatically restored, as petitioners now contend, either under

the Administration's bill or under P.L. 88-108 as eventually enacted.

In the petition filed as No. 863 (pp. 12-27), we have demonstrated that the Congress rejected the Administration's bill and adopted the arbitration provisions of the Railway Labor Act so as to bring about a "complete and final disposition" of the 1959 and 1960 Section 6 notices. In so doing, the Congress intended that the expiration of Award 282 should have the same effect as the expiration of any other collective bargaining agreement or arbitration award under that Act. Under that Act, the rights and duties of the parties to such an agreement or award are not changed by the expiration of the agreement or award, but continue until changed pursuant to new Section 6 notices in accordance with the Act. The purpose and effect of an expiration date in the agreement or award is to permit the parties thereafter to proceed under the Act with bargaining upon new Section 6 notices proposing changes, rather than to restore the situation in effect prior to such agreement or award.

Petitioners' final reliance with respect to this issue (Pet., at 11-12) is a statement in the opinion of this Court in *Engineers* v. *Chicago, R. I. & P. R. Co.*, 382 U.S. 423, 433 (1966), to the effect that the Award "was to be a complete and final disposition of these issues for a period not exceeding two years from the date the award would take effect. . . ." No one contends otherwise. The carriers agree that the modifications in the prior rules and agreements made by or pursuant to the Award are subject to change following expiration of the Award, pursuant to valid Section 6 notices proposing such changes and otherwise in accordance with the Railway Labor Act. The judgment entered by the trial court, affirmed in this regard by the Court of Appeals, expressly so provides (JA 176-178). We note, however, that the only issue decided by

this Court in that case is that P.L. 88-108 and Award 282 did not pre-empt so-called "full crew" laws, and the Court did not in any way purport to decide what agreements and rules were to be in effect following the expiration of Award 282.

2. Petitioners make a further argument with respect to the 10 disputed agreements pursuant to Award 282 which are described in Section F of the Stipulation as to Facts. That argument (Pet., at 14-18), in essence, is that the courts below erred in refusing to construe those agreements as expressly providing for restoration of the prior agreements and rules upon the expiration of Award 282. The trial court found (Pet., App. B, at 19a) that:

> "It is clear that all of these agreements were adjusted to the duration of the effective period of Award 282, they were made in contemplation of that Award, and the reasonable construction of these agreements, in the opinion of the Court, is that they have the same effect as awards of Special Boards of Adjustment created under the Award, and the same consequences attach, namely, that a new status is created which cannot be changed except in the manner already discussed [*i.e.*, in accordance with the Railway Labor Act]."

The Court of Appeals affirmed "both the reasoning and result reached by the District Court in construing" those agreements (Pet., App. F, at 90a, fn. 6).[2]

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[2] In so doing, the Court of Appeals expressly referred only to "the agreements entered into between the BRT and the Kansas City Southern Railway and Louisiana & Arkansas Railway, and the Wichita Terminal Association." Apparently, this was because it was only with respect to those two agreements that the issue was seriously pressed by petitioners. In the petition (p. 16), the first such agreement is the only one as to which specific language is relied upon. While that agreement provides

We believe that the courts below correctly construed the agreements in question, but even if it were possible to construe one or more of them in the manner contended for by petitioners, in our view this is not the kind of issue which this Court should concern itself with. No issues of general importance are involved, but simply the proper construction to be given to particular language in ten separate agreements between a union and a carrier. It was the presence of such relatively minor issues which primarily led each of the courts below to render more than one opinion (see Pet., at 13).[3] They necessarily would complicate the briefing, argument and decision of the case in this Court if the Court should review those issues as well as the more important issues presented in No. 863 and in that part of the instant petition discussed at pp. 4-9, *supra*. We note that if the Court should agree

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that it "does not affect schedule rules, agreements, (and practices with respect to consist of crews), in effect on the day preceding the effective date of this agreement," except as modified by the agreement and the Award, for the period thereof, it also provides that the "agreement . . . shall remain in effect until January 25, 1966, unless the parties agree otherwise, in accordance with Article IV, Duration of the Award of Arbitration Board No. 282" (JA 68). Hence, the parties expressly tied the duration of the agreement into the duration of Award 282, so that the situation after January 25, 1966 was made dependent upon the resolution of the basic issue as to the effect of the expiration of the Award. So, too, in the agreement with the Wichita Terminal Association (JA 69-70), the parties "recognize[d] that this Carrier and the Brotherhood of Railroad Trainmen are parties to Award of Board of Arbitration No. 282 and will be subject to whatever disposition is made of the Crew Consist issue nationally at the expiration of . . . the effective period of Award No. 282."

[3] We note that the Memorandum and Order entered by the court below on September 21, 1967 (incorrectly described by petitioner as a "third opinion") and subsequent occurrences with respect thereto, referred to on pp. 13-14 of the petition, did not relate to this case. The Memorandum and Order was entered in the case (Dockets No. 20191, 20192, 20125 and 20216) relating to the expiration of the firemen's provisions of the Award, and was in response to a petition for rehearing filed only in that case. It has nothing to do with any issue involved in this case. See Pet., App. H, at 92a-94a, and the petition for writ of certiorari filed in No. 933, at pp. 11-14, 27-36.

with petitioners' basic contention that the Congress intended the prior agreements and rules to be automatically revived upon expiration of the Award, such a holding would apply to the ten agreements in question so as to obviate the issue as to how those agreements should be interpreted. Hence, we submit that the petition should be denied insofar as it relates to the interpretation of those agreements, which issue is the one purportedly presented by Question No. 2 in the petition (p. 3), but which we believe is more accurately stated in Question No. 2 on page 2 of this brief.

3. The courts below held that the last day of the two-year period of the crew-consist provisions of Award 282 was January 25, 1966. Petitioners contend (Pet., at 18-21) that the last day was January 24, 1966. As petitioners indicate, the only practical significance of this issue concerns a single award by a special board of adjustment, which award was rendered on January 25, 1966. In view of the holding by the Court of Appeals that the procedures established by Award 282 could not validly be initiated or completed after the expiration of the Award (Pet., App. F, at 76a-77a), that special board award would have been held to be invalid if the Court of Appeals has also concluded that January 24, 1966 was the last day of Award 282. As we show in the petition in No. 863 (pp. 16-23), however, the Court of Appeals erred in holding that the procedures established by the Award could not be initiated or completed after expiration of the Award. If so, this issue as to whether January 24 or January 25, 1966 was the last day of the Award has no pratical significance.

In any event, that issue is not one which deserves review by this Court. It has no general importance with respect either to the situation following the expiration of the Award or with respect to any broad principle of law, and

is one of the minor issues which would unduly complicate a review of the case by this Court. Moreover, the decision below is correct.

As the Court of Appeals pointed out (Pet., App. F, at 85a-86a), any doubt about the matter should appropriately be resolved in favor of an interpretation which sustains the validity of the special board award and the conclusion of the special board that it was authorized to render that award on January 25, 1966.[4] But however that may be, in our opinion there is no basis for reasonable doubt about the fact that the last day of the Award was January 25, 1966. Certainly, the parties had no doubt about that fact at the time. Only a few days prior to January 25, 1966, the Brotherhood of Railroad Trainmen (the union involved in the special board award rendered on that date) sent a letter to the carriers in which it stated that Award 282 expired "at 12:01 AM, January 26, 1966" (JA 10, 23, 141), and that union requested that the proposals in its 1965 Section 6 notices be made "[e]ffective January 26, 1966" (JA 116-117). Respondents alleged in their complaint that "the Award ceases to continue in force as an award . . . after January 25, 1966" (JA 9), and petitioners admitted in their answer "that the Award of Arbitration Board No. 282 ceased to exist after January 25, 1966" (JA 22). The proceedings in the trial court were conducted throughout on that basis, including the Stipulation as to Facts entered into by the parties which listed the special board award in question among those made during the period of the Award (Section A, JA 62-65) rather than in the Section (I, JA 70-75) giving detailed facts concerning the special board awards rendered (or

[4] With respect to the statement that the "third opinion of the Court of Appeals shows its uncertainty" (Pet., at 20) with respect to this issue, that so-called "third opinion" was rendered in another case and did not involve this case or this issue. See fn. 3, at p. 10, *supra*.

as to which proceedings before a special board of adjustment were still pending) after the expiration of Award 282.

Petitioners first raised the contention that January 24, 1966 was the last day of Award 282 during a hearing on the form of the judgment to be entered by the trial court following its opinions deciding the issues presented (JA 150-151). In view of the circumstances related above, we submit that the trial judge was fully justified in rejecting that belated contention because January 25, 1966 was "the date always used" by everyone concerned until after he had made his rulings based thereon (JA 151). Even if the crew-consist provisions of Award 282 otherwise would have expired on January 24, 1966, the common understanding by the unions and the carriers that this would not occur until the end of January 25, 1966 would constitute an extension of the Award by agreement, as is expressly permitted by Section 4 of P.L. 88-108 and Article IV of Award 282.

That common understanding accords, furthermore, with established law. The effective date of the crew-consist provisions of Award 282 was January 25, 1964. Section 4 of P.L. 88-108 provided that the Award "shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years *from* the date the award takes effect, unless the parties agree otherwise" (emphasis added). Article IV of Award 282 provided that it "shall continue in force for two years *from* the date it takes effect, unless the parties agree otherwise" (emphasis added). In *Sheets* v. *Selden's Lessee,* 2 Wall. (69 U.S.) 177, 190 (1864), this Court stated that: "The general current of the modern authorities on the interpretation of contracts, and also of statutes, where time is to be computed *from* a particular day or a particular event . . ., is to exclude the day thus designated, and to include the

last day of the specified period" (emphasis added). This continues to be the rule in the federal courts. *E.g.*, Rule 6(a) F.R. Civ. P.; *Burnet* v. *Willingham L. & T. Co.*, 282 U.S. 437, 439-440 (1931); cf., *Union National Bank* v. *Lamb*, 337 U.S. 38, 40-41 (1949).

We submit, therefore, that the Court should deny the petition insofar as it relates to the issue of whether January 24 or January 25, 1966 was the last day of Award 282. That issue is stated as Question No. 3 in the petition (p. 3), and as Question No. 3 herein (p. 2, *supra*).

4. The final issue raised in the petition (pp. 22-24) concerns the agreement entered into by the Brotherhood of Railroad Trainmen and the Richmond, Fredericksburg & Potomac Railroad Company, pursuant to Award 282. Petitioners now contend that there was no such agreement. But they stipulated for purposes of the case (JA 70) that "the BRT agreed" that the carrier "could make certain changes in crew consist, pursuant to Section III of the Award. . . ." In the District Court, petitioners argued that "the only consensual arrangement agreed to by BRT was that the carrier could operate with crews smaller than prescribed in pre-existing rules 'until January 25, 1966.'" Pre-Trial Memorandum on Behalf of Brotherhood of Railroad Trainmen and Switchmen's Union of North America, at 10. By the time the case reached the Court of Appeals, petitioners thought it "doubtful that there was any agreement at all." Brief for Appellants in No. 20152, at 39. The Court of Appeals did not share those doubts (Pet., App. F, at 90a, fn. 6), and understandably so in view of the stipulation entered into by the parties. Nevertheless, petitioners now have come full circle and flatly urge that no agreement was made.

The fact of the matter is that the parties did agree, as

is shown by the stipulation and attached correspondence (JA 70, 80-90), and that agreement was implemented as of November 15, 1964 and has been applied ever since. They were in dispute as to what the effect of the expiration of Award 282 would have upon the agreement—the dispute which constitutes the fundamental issue in this case. The holding by both courts below that the rights and duties of the parties under such agreements continue to apply until changed in accordance with the Railway Labor Act resolved that dispute with respect to this particular agreement as it did with respect to many others and with respect to the special board awards.

We have indicated that we do not object to a review of that fundamental issue as raised by this petition, if the petition in No. 683 is granted (pp. 4-9, *supra*). Should the Court agree with petitioners that the Congress intended the prior agreements and rules to be restored automatically upon expiration of the Award, that ruling would also apply to the situation as between the Richmond, Fredericksburg & Potomac Railroad Company and the Brotherhood of Railroad Trainmen. But petitioners' further contention, limited to that one situation, that there was no agreement at all, is meritless in view of the stipulated facts, and is without any general significance either in this case or in future litigation. As with the other minor issues raised by petitioners, we believe that the matter is not one which calls for review by this Court and that the consideration by this Court of the broad issues presented in No. 863 and by another aspect of the instant petition (see pp. 4-9, *supra*)[5] should not be complicated by extending the grant of certiorari to such minor issues. For these reasons, we

[5] Similar issues are also before the Court with respect to the expiration of the firemen's provisions of Award 282, in Nos. 859 and 933.

submit that the petition should be denied with respect to the issue stated as Question No. 4 in the petition (p. 3) and as Question No. 4 herein (p. 2, *supra*).

Respectfully submitted,

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005
Of counsel for respondents.

FRANCIS M. SHEA
RICHARD T. CONWAY
734 Fifteenth Street, N.W.
Washington, D.C. 20005

JAMES R. WOLFE
Union Station Building
Chicago, Illinois 60606
Attorneys for respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 861

BROTHERHOOD OF RAILROAD TRAINMEN, SWITCHMEN'S UNION OF NORTH AMERICA, *Petitioners*,

v.

THE AKRON & BARBERTON BELT RAILROAD COMPANY, ET AL., *Respondents*.

PETITIONERS' REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

MILTON KRAMER
LESTER P. SOHOENE
MARTIN W. FINGERHUT
Attorneys for Petitioners

SOHOENE AND KRAMER
1625 K Street, N.W.
Washington, D. C. 20006

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PETITIONERS' REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

This reply brief is directed at the Respondents' response concerning two of the issues which Petitioners have asked this Court to review.

1. The first of these issues is whether the Court below was correct in holding that the Railway Labor

Act prohibits parties subject to the Act from entering into agreements of limited duration with the expressed intent that upon the expiration of the agreements the prior conditions of employment as modified by the agreements are again to become effective. The issue arose with respect to ten agreements which were of limited duration.

The Respondents contend that all that is involved is a matter of contract construction and the issue is not of sufficient importance to occupy the time of this Court. This contention is in error. The issue is concerned not only with the construction of contracts, but primarily with the construction of the Railway Labor Act.

The opinion of the Court below shows quite clearly that its holding that the substantive changes in work rules, resulting from agreements of limited duration, continue in effect upon the expiration of the Arbitration Award did not result from its interpretation of the agreements but from its interpretation of the Railway Labor Act. Indeed, the Court specifically so declared in its opinion of July 31, 1967. The Court stated (App. at 45a-46a):

> "Our ruling is that the work rules created by the Award constituted a new plateau that was not automatically eroded when the Award expired. . . . The ruling is not based on the Award, which had only a 2-year life, or on any agreement of the parties. The predicate of our ruling is, simply, the force of the Railway Labor Act. . . . This new plateau reasoning applies even though the work rules are established by agreements of limited duration. *'The effect of § 6 is to prolong agreements subject to its provisions regardless of what*

they say as to termination.'[17]'' (Footnote omitted, emphasis added.)

It is this ruling of the Court, dealing with the statutory construction of the Railway Labor Act as it relates to the contract-making power of the parties subject to the Act, which we seek to have reviewed by this Court. We submit the issue is of fundamental importance and one which is the proper concern of this Court.

2. The second issue upon which we feel compelled to respond concerns the dispute between the Petitioner Brotherhood of Railroad Trainmen and the Respondent Richmond, Fredericksburg and Potomac Railroad Company. In our petition, we conceded that this issue was not of sufficient importance in and of itself to warrant a grant of certiorari but that if this Court decided to review any of the basic determinations of the Court below it likewise should review that Court's holding with respect to this issue.

However, the Respondents' misstatement of the facts surrounding this issue cannot be permitted to stand unchallenged. The Respondents state that our position here that there was no agreement between the Brotherhood and the railroad was not raised heretofore, and that we had conceded in the Courts below that an agreement had been reached. This statement is not true.

The Respondents refer to the Stipulation entered into by the parties in the District Court on this issue which recites that the parties agreed that the railroad could make certain changes. The Respondents know full well, however, that that language was not intended as a concession by the Brotherhood that the corre-

spondence between the parties amounted to an agreement so as to preclude the Brotherhood from arguing to the contrary. They know this to be the fact because the matter was discussed at the time the Stipulation was prepared and they agreed that it would not so be used.

The Respondents point further to a statement taken from a pre-trial memorandum filed by the Brotherhood in the District Court in which it argued that the "only consensual arrangement agreed to by BRT was that the carrier could operate with crews smaller than prescribed in pre-existing rules 'until January 25, 1966.' " This too, Respondents assert, shows that the Brotherhood had taken the position that an agreement had been reached. The Respondents, however, omitted the remaining three sentences immediately following the sentence they quote. The rest of the paragraph reads:

> "The BRT never agreed to any proposal that meant anything else. If the agreement was not the agreement which the BRT said it was accepting, then there was no agreement between the parties reducing the requirements of the pre-existing crew-consist rules. Assuredly, the pre-existing crew-consist rules are now governing, either because the only agreement to reduce their requirements was to reduce them temporarily until January 25, 1966, or because there never was an agreement to reduce them at all."

The Brotherhood, contrary to Respondents' assertion, argued both in the District Court and in the Court of Appeals that the correspondence between the Brotherhood and the railroad did not result in agreement. The final letter of the railroad to the Brotherhood candidly admitted "that there is a difference

between the parties on the duration of the agreement." (R. 90) We again submit that if any part of the decision of the Court below is reviewed by this Court that this issue be reviewed as well.

Respectfully submitted,

MILTON KRAMER
LESTER P. SCHOENE
MARTIN W. FINGERHUT
Attorneys for Petitioners

SCHOENE AND KRAMER
1625 K Street, N.W.
Washington, D. C. 20006

January, 1968.

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 862

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN,
Petitioner

v.

THE AKRON & BARBERTON BELT RAILROAD COMPANY,
ET. AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES D. HILL
806 15th Street N. W.
Washington, D. C.

HARRY E. WILMARTH
1120 Merchants National
Bank Building
Cedar Rapids, Iowa

Attorneys for Petitioner

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement of the Case	4
Reasons for allowance of the writ	10

CITATIONS

CASES:

Brotherhood of Locomotive Engineers v. Baltimore & Ohio R. Co., 372 U.S. 284 (1963) 5

Brotherhood of Locomotive Engineers v. Chicago, Rock Island & Pacific R. Co., 382 U.S. 423 (1966) 13, 21

Brotherhood of Railroad Trainmen v. Chicago River and Indiana R. Co., 353 U.S. 30 (1957) 19

Brotherhood of Railroad Trainmen v. Toledo, P. & W. R.R., 321 U.S. 50 (1943) 20, 21

Chicago, Rock Island & Pacific R. Co. v. Switchmen's Union, 292 F.2d 61 (C.A. 2, 1961) 19

Elgin, Joliet & Eastern Railway Co. v. Brotherhood of Railroad Trainmen, 302 F.2d 540 (C.A. 7, 1962) .. 19

Hilbert v. Pennsylvania R. Co., 290 F.2d 881 (C.A. 7, 1961) 21

Manion v. Kansas City Terminal Railway Co., 353 U.S. 706 (1957) 21

Missouri-Illinois R. Co. v. Order of Railway Conductors, 322 F.2d 793 (C.A. 8, 1963) 19

Order of Railroad Telegraphers v. Chicago and Northwestern R. Co., 362 U.S. 330 (1960) 18, 21

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 22

Pullman Co. v. Order of Railway Conductors, 316 F.2d 556 (C.A. 7, 1963) 19

Westchester Lodge 2186, etc. v. Railway Express Agency, 329 F.2d 748 (C.A. 2, 1964) 21

Wilson v. New, 243 U.S. 332 (1917) 22

Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522 (1923) 22

STATUTES:

Page

Public Law 88-108 .....2, 3, 6, 12, 15, 21

Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.* 3, 9, 18, 19, 20

Public Law 90-54, July 17, 1967 21

Railway Labor Act, 45 U.S.C. § 151, *et seq.* 3, 6, 9

MISCELLANEOUS:

Report of the Presidential Railroad Commission (1962) 4, 14

Hearings before the Senate Committee on Commerce on S.J. Res. 102, 88th Congress, 1st Session ..8, 11, 12, 16, 17

Hearings before the House Committee on Interstate and Foreign Commerce on H.J. Res. 515, 88th Congress, 1st Session 8, 11, 12, 17

Senate Report No. 459, 88th Congress 12

House Report No. 713, 88th Congress 12

Opinion of the Neutral Members of Arbitration Board No. 282, 54 LRRM 20 10

Supreme Court of the United States

OCTOBER TERM, 1967

No.

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN,
Petitioner

v.

THE AKRON & BARBERTON BELT RAILROAD COMPANY,
ET. AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Order of Railway Conductors and Brakemen prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled cause on July 31, 1967 (App. 91a).[1]

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[1] "App." refers to the separate appendix filed in this Court; "R." refers to the Joint Appendix filed by petitioner and respondents in the Court below, in causes 20,158 and 20,191.

OPINIONS BELOW

The opinions of the United States District Court for the District of Columbia are reported at 250 F. Supp. 691 (D.C.D.C., March 3, 1966) and 253 F. Supp. 538 (D.C.D.C., April 19, 1966). App. 2a-15a, 25a-29a. The opinions of the United States Court of Appeals dated May 12, 1967 and July 31, 1967 (App.. 33a-90a) are not yet officially reported. They are unofficially reported at 65 LRRM 2229, 2995. Related decisions of the District Court and of the Court of Appeals involving other parties to this dispute are reported at 252 F. Supp. 207, 254 F. Supp. 306, 253 F. Supp. 682, 255 F. Supp. 476, and 380 F. 2d 570.

JURISDICTION

The judgment of the United States Court of Appeals was entered on July 31, 1967 On October 18, 1967, the Chief Justice of the United States extended the time within which petitioner might file this petition for a writ of certiorari to and including November 28, 1967. The jurisdiction of this Court is conferred by Section 1254 of Title 28, United States Code.

QUESTIONS PRESENTED

1. Whether the interim two-year crew consist work rules created by Arbitration Board No. 282, under the authority of Public Law 88-108, continue to survive after the end of the two-year period of the Award as a permanent part of the collective bargaining agreements between the parties, despite the intent of Congress and of the Arbitration Board, and despite the express provisions of Public Law 88-108 and of the Award, that they shall continue in force for two years only.

2. Whether notices served by the petitioner on the respondent carriers, during the two year period, seeking negotiations to reach crew consist agreements in accord with the standards of Arbitration Board No. 282, were premature and ineffective to create any duty on the part of the carriers to bargain, despite the intent of Congress to provide a 2-year period in which the parties could further attempt to reach agreements, and despite the command of Board No. 282 to the parties to return to their local properties and negotiate lasting agreements.

3. Whether the Court below properly enjoined the members of the petitioner brotherhood from withdrawing from service at the end of the two-year period because of the refusal of the carriers to negotiate and mediate as required by the Railway Labor Act and by the Award of Board No. 282, despite the provisions of Section 4 of the Norris-LaGuardia Act that no Court may issue a restraining order to prohibit any person from ceasing or refusing to perform work, and despite Section 8 of that Act which prohibits the issuance of a restraining order in favor of a complainant who has failed to comply with any obligation imposed by law or who has failed to make every reasonable effort to settle such dispute.

STATUTES INVOLVED

Public Law 88-108, 77 Stat. 132 (App. 111a)

Sections 5 and 6, Railway Labor Act, 44 Stat. 580, as amended, 45 U.S.C. §§ 156, 156 (App. 115a)

Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 101, et seq. (App. 125a)

Relevant portions of these statutes are set out in a separate Appendix to this petition.

STATEMENT OF THE CASE

This appeal involves the consequences which flow from the expiration on January 24 (or 25), 1966,[2] of the award of Arbitration Board No. 282 (App. 95a). The issues concern most of the nation's major railroads and four labor organizations which represent operating railroad employees.

Prior to 1963, the use of firemen on locomotives was governed by the National Diesel Agreement of 1950 and the consist of road and yard crews was governed by system-wide or local agreements, formal and informal, or by unwritten customs and practice, and in some states was affected by state "full crew" laws. *Report of the Presidential Railroad Commission* (1962) pp. 36, 54. On November 2, 1959, most of the railroads in the United States served on the labor organizations written notices pursuant to Section 6 of the Railway Labor Act proposing the elimination of all agreements which required the use of firemen on other than steam powered engines or which required a stipulated number of trainmen in train crews, leaving the use of such employees in the unrestricted discretion of railroad management (R. 23-25). On September 7, 1960, the labor organization served counter-proposals under Section 6 of the Railway Labor Act proposing the establishment of rules or agreements to provide a minimum engine crew of one engineer and one fireman, and a minimum train crew of not less than one conductor and two trainmen. (R. 25).

Thereafter the parties engaged in negotiations on the properties and in mediation, as required by Sections 5 and 6 of the Railway Labor Act, and also in media-

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[2] The correct expiration date is in issue between other parties, but is not material to this petitioner.

tion before a Presidential Railroad Commission, appointed by President Eisenhower. Having exhausted these procedures, the carriers served notice on the organizations that as of August 16, 1962, their proposed elimination of existing agreements would unilaterally be placed into effect. Upon suit brought by the organizations, this Court held that the parties had exhausted the procedures of the Railway Labor Act, and were free to resort to self help. *Brotherhood of Locomotive Engineers* v. *Baltimore and Ohio R. Co.*, 372 U.S. 284 (March 4, 1963). On April 3, 1963, President Kennedy, acting pursuant to Section 10 of the Railway Labor Act, appointed an emergency board, headed by Judge Samuel Rosenman (Emergency Board No. 154) to make recommendations for resolution of the dispute. The Secretary of Labor and the National Mediation Board joined in further negotiations between the parties, all without success. The carriers then announced that they would place their new rules into effect on July 10, 1963, and the organizations indicated that this would precipitate a strike (Senate hearings, p. 42).[3] The President then requested the parties to maintain the status quo until July 29, in order that he might submit a message to Congress. On July 22, the President submitted his message, recommending emergency legislation, and accompanied by a draft bill. (Senate hearings, pp. 4-15). The President's message and bill proposed a two-year period of further negotiations by the parties, during which time temporary, interim work rules could be imposed by the Interstate

[3] References hereafter to "Senate hearings" and "House hearings" refer, respectively, to Hearings before the Senate Committee on Commerce on S.J. Res. 102, 88th Cong. 1st Sess. and to Hearings before the House Committee on Interstate and Foreign Commerce on H.J. Res. No. 565, 88th Cong. 1st Sess.

Commerce Commission, such rules to govern until the parties reached agreement, but not to exceed two years. Subsequent proceedings before the House and Senate Commerce Committees and the reports of both Committees show that the proposed legislation contemplated a two-year moratorium on the right of the parties to engage in self-help, and during which they were expected to engage in further effort to reach agreement, with the guidance of temporary rules imposed by an arbitration board, which would govern until the parties reached agreement, but not to exceed two years.

Congress thereupon enacted Public Law 88-108 (77 Stat. 132, App. 111a) effective August 28, 1963. It conformed to the President's recommendations with the exception that the interim rules would be imposed by a special arbitration board, rather than by the Interstate Commerce Commission. The law prohibited the carriers and the organizations from implementing their notices of November 2, 1959, and September 7, 1960, except by agreement or arbitration, established an arbitration board of seven members, authorized it to make a decision as to those portions of the notices dealing with the use of firemen and crew consist, and provided that the arbitration award "shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed 2 years from the date the award takes effect . . ."

The Arbitration Board was appointed, held hearings, and made an award with respect to the use of firemen and crew consist, dated November 26, 1963, and effective January 25, 1964 (App. 95a). The portions of the award material to this petition provided:

1. That those portions of the notices of the parties concerning the use of firemen and crew consist "are

denied, except to the extent hereinafter provided." (Sec. I);

2. That the issue of road and yard crew consist shall be remanded to the local properties for negotiation, that pending the consummation of local agreements no change may be made in pre-existing rules, that either party may give written notice of a proposed change in a stipulated number of trainmen where existing rules require the use of more or less than 2 trainmen, that if the parties cannot agree either party may refer the dispute to a special board of adjustment whose decision shall be binding on the parties, and that displaced employees should retain their right to assignment until death, retirement or discharge for cause (Sec. III);

3 That "this Award shall continue in force for two years from the date it takes effect, unless the parties agree otherwise." (Sec. IV).

Pursuant to the command of the Board, during the effective period of the award the petitioner served upon various respondent railroads a notice proposing an agreement that the minimum crew in road train service shall consist of not less than one conductor and two brakemen (R. 76-78, 82). The carriers all took the position that the matter of crew consist was not subject to negotiation during the two-year period of effectiveness of the award, and declined to negotiate or to enter into an agreement on the subject (R. 78-79, 83-86). In five instances petitioner invoked the services of the National Mediation Board which, over the protests of the carriers, assumed jurisdiction of the dispute, and in these instances the matters remained pending before the National Mediation Board on the date of termination of the award. (R. 79, 87-159). The same events occurred with respect to notices served

by the Brotherhood of Railroad Trainmen. During the two-year period the carriers eliminated 18,000 firemen positions and 7,574 trainmen positions (R. 27-28).

On January 19, 1966, 178 carriers commenced the instant action against the Brotherhood of Railroad Trainmen, the Switchmens Union of North America, and the Order of Railway Conductors and Brakemen, seeking an adjudication that the interim two-year crew consist rules created by the Board continued to survive as permanent rules, and an injunction restraining the employees represented by the labor organizations from withdrawing from service because of the refusal of the carriers to meet and negotiate. Jurisdiction of the District Court was invoked under 28 United States Code, Sections 1331, 1337, 2201, and 2202. (R. 7). Despite denials of the organizations that any strike was intended, the District Court issued a temporary restraining order on January 24, 1966, which remained in effect until March 29, 1966, when it was abandoned by the plaintiffs (R. 28, 30, 39).

After hearing, the District Court held that:

(1) Crew consist rules established by agreements or by awards of special Boards of Adjustment under Section III of the Award survived the termination of the effective period of the Award and created a new status which must be maintained by the parties until changed by agreement, or until one of the parties had served a notice under Section 6 of the Railway Labor Act and had exhausted the procedures of that Act, and that pre-existing crew consist rules were not revived upon termination of the Award (R. 47-49, 171; App. 10a-13a).

(2) The carriers may not take further steps to eliminate additional positions under the Award after January 25, 1966 (R. 49, 171; App. 11a-13a).

(3) None of the provisions of the Norris-LaGuardia Act are applicable to the dispute between the parties, and the labor organizations were properly subject to injunction (R. 51, 174; App. 14a).

(4) The notices served under Section 6 of the Railway Labor Act by the petitioner during the two-year period of effectiveness of the Award of Arbitration Board No. 282, proposing the establishment of rules that a minimum crew should consist of a conductor and two trainmen, were premature, that the respondent carriers had no obligation to negotiate with petitioner as required by Section 6 of the Railway Labor Act until after January 25, 1966 (R. 51, 163-165, 172-173; App. 13a, 25a-27a), and that petitioner could not lawfully invoke the services of the National Mediation Board until after negotiations between the parties had occurred after January 25, 1966, and that the applications for mediation made by petitioner during the two-year period had been premature (R. 165-167, 173; App. 27a-29a).

On appeal, the Court of Appeals affirmed these rulings.

The carriers instituted a similar action against the Brotherhood of Locomotive Firemen and Enginemen, seeking an adjudication of the consequences of termination of the effective period of the Award as to firemen, and an injunction, which was separately heard and decided by the District Court. 253 F. Supp. 682; 255 F. Supp. 476. On appeal, the causes were consolidated for hearing and decision. However, this petitioner represents only conductors and trainmen and is not concerned with those portions of the decisions below construing the effect of termination of the Award as to firemen.

REASONS FOR ALLOWANCE OF THE WRIT

(1) Arbitration Board No. 282 in its award, "froze" all existing crew consist rules and practices for a two-year period except that in the case of branch lines or road service where the existing rules or practice required the employment of more or less than two trainmen, either party might apply to the Board for modification of the rule. The neutral members of the Board wrote an accompanying opinion to the Award in which they said that:

> "It was agreed that all situations other than those involving a crew consist of one conductor (foreman) and two brakemen (helpers) would be reviewable. So-called 'one-and-two' situations would remain unchanged. Thus, the organizations could seek changes on the basis of alleged undermanning if the present rule or practice called for only one brakeman or helper. The carrier, for example, could seek change on the basis of alleged overmanning if the present rule or practice called for three or more brakemen or helpers . . . (54 LRRM 20, 36).

The Board rejected the contention of railroad management that it should have unlimited discretion to determine crew consist, saying that "the employees involved, however, are entitled to more protection than is afforded by these assurances of good faith." (54 LRRM 35). It directed the parties to return to their local properties to negotiate local agreements disposing of the issue. During the two-year period of the effectiveness of the Award the petitioner attempted to negotiate agreements with the respondents providing for a minimum crew of a conductor and two trainmen, according to the guidelines of the Board, but the carriers adamantly refused to agree, or even to negotiate.

They proceeded unilaterally to apply to the Board for crew reductions in individual cases. At the end of the two-year period they commenced the present action and obtained an adjudication that the interim rules so created in individual cases by the Board or by special agreements, continued to exist as a part of the collective bargaining agreements between the parties. In reaching this conclusion, we submit, the Court below misconstrued the intent of the President, the Congress and of the arbitration board, as well as the clear language of the law and of the Award.

The President in his message to the Congress made the following proposal:

> "I recommend, therefore, that—for a 2-year period during which both the parties and the public can better inform themselves on this problem and alternative approaches—interim work rules changes proposed by either party to which both parties cannot agree should be submitted for approval, disapproval or modification to the Interstate Commerce Commission . . . .
>
> I stress the fact that, unlike compulsory arbitration, these procedures would provide only interim changes and only for those situations and for such length of time as the parties are unable to agree by collective bargaining. (Senate hearings, pp. 8-10).

Secretary of Labor Wirtz, who testified in support of the President's bill, said to the House Commerce Committee that at the end of the two-year period "the interim rule would at that point no longer be effective" (House Hearings, p. 55) and agreed that ". . . that decision goes into effect and stays in effect until either the parties reach an agreement by collective bargaining or the 2-year period expires" (House

Hearings, p. 59). Identical representations as to the effect of the proposed legislation were made by Chairman Walrath of the Interstate Commerce Commission, Acting Secretary of Commerce Roosevelt, and spokesman for the carriers. (See House Hearings pp. 64, 172, 174, 551, 555, 605, 982.) The same explanations with respect to the purpose and effect of the bill were repeated before the Senate Commerce Committee. See Senate Hearings, pages 49-51, 54, 62-63, 364, 370-371, 375, 414-415, 427.

The House and Senate Committee reports repeated the same understanding. Senate Report No. 459, 88th Congress, said:

> "Under the terms of the resolution, the arbitration award would be binding for no more than 2 years, unless the parties mutually agree to a different period. The Committee has imposed this limitation in harmony with the President's recommendation, in order to closely limit the scope and impact of the resolution." (U.S. Code Congressional and Administrative News, 1963, p. 1406)

And the House Committee, in House Report No. 713, 88th Congress, said:

> "The arbitration award is to be in effect for the period determined by the arbitration board but that period cannot exceed 2 years from the date the award takes effect; however, the award can be in effect for a different period if the parties agree thereto."

Both P.L. 88-108 and the Award specifically provided that the Award should be limited to a duration of two years. Thereafter this Court had occasion to interpret the effect of the Award, and so described it. In *Brotherhood of Locomotive Engineers* v. *Chicago,*

Rock Island and Pacific R. Co., 382 U.S. 423 (January 31, 1966) this Court said:

> "In his message the President expressed no desire to have them pass a law that would finally and completely dispose of the problem of the number of men who should man the crew of a train, but in fact he warned the Congress that 'it would be wholly inappropriate to make general and permanent changes in our labor relations statutes on this basis' and that any 'Revolutionary changes even for the better carry a high price in disruption . . . (that) might exceed the value of the improvements.' . . .
>
> Congress enacted the bill proposed by the President with one significant change. He had recommended that a binding determination of the issues not resolved by collective bargaining be made by the Interstate Commerce Commission . . . Subsequent to this both the House and Senate Committees dropped a section of the proposed bill that would have vested power in the Commission to make binding settlements. Instead of that section the Act passed by Congress provided for establishment of an arbitration board to consist of seven members, two appointed by the railroads, two by the unions and three to be appointed by the President should the four members named by the railroads and unions fail to agree among themselves on an additional three. The arbitration board was given power to resolve the dispute over the firemen and full-crew questions. Their award was to be a complete and final disposition of these issues for a period not exceeding two years from the date the awards would take effect. . . . Congress wanted to do as little as possible in solving the dispute which was before it . . ."

This history makes clear beyond controversy that the interim work rules created by or under the Award,

in the language of this Court, were to dispose of the matter "for a period not exceeding two years from the date the awards would take effect . . ." or, as Secretary Wirtz said, "the interim rule would at that point no longer be effective."

Despite all of this, the Court below held that the interim work rules created by or under the Award survived the two-year period and continue as permanent rules between the parties. The Court below did not base its decision on any language of the Award or of the enabling act, or of its legislative history, but on the practical consideration that it would be "unreasonable" and "would necessarily mean trying to recreate a practically unrecoverable situation and sweeping away a host of rights that had already vested concomitant with the award, made final under the Act, permitting reductions in the work force." (App. 46a-47a.) To us, this means that the Court below, believing itself capable of better legislative draftsmanship and purpose than the Congress, determined to amend the law. Further, its assumption of unsettling havoc if the interim rules should not remain effective is unwarranted. Although 7,574 trainmen positions became earmarked for future elimination during the two-year period, encumbent employees were entitled to remain in the positions until death, retirement, or discharge for cause, and there is no evidence in the record as to the number, if any, of positions which had actually been eliminated at the end of the two-year period.

Further, even if the decision of the Court below was correct, it was incomplete and defective. A total of 122,000 trainmen positions were involved in the crew consist dispute. *Report of the Presidential Railroad Commission,* p. 27. The Arbitration Board created an

interim two-year rule as to all of them, by "freezing" all existing positions for the two-year period, except to the extent that changes might be made in individual cases involving crews of more or less than two trainmen, by application to the Board. A total of 7,574 positions were eliminated pursuant to this provision. No change was made in the status of the remaining 122,000 positions. Although the District Court held that the Award created a new status, or plateau, which survived the termination of the Award, the decree of the District Court adjudicated only that the awards of Special Boards of Adjustment, and special agreements entered into under the Award, authorizing the 7,574 reductions, created a new status which must be maintained. (R. 171-172). The decree was silent as to the survival of the main portion of the Award. Thus the decree covered only a small portion of the rules established by the Board; the few unusual situations in which previous crew consists of one-and-three or more were reduced to one-and-two. Although this error was briefed and argued to the Court of Appeals that Court made no disposition of the issue. The carriers take the position that their Section 6 notices of November 2, 1959, ripened into effectiveness before the enactment of Public Law 88-108 and that all pre-existing crew consist rules and agreements have expired. (Complaint, par. 12, 13, 17; R. 14-17.) Thus the status of all of the 122,000 trainmen positions, except for 7,574, is in doubt and confusion. It would seem that if the work rules created by the Award survive its termination, all of them survive, not merely those governing 7,574 reductions which were favorable to the carriers, and that the status of all the remaining positions, which were frozen by the Board for the two-year period, also continue as permanent crew consist rules

binding in the parties. But the Court below made no decision as to the effect of the expiration of the Award on any of them except 7,574.

(2) The Arbitration Board, by providing that one-and-two crew consists should remain unchanged for the period of the Award, set a guideline or standard and, having done so, directed the parties to return to their local properties and negotiate permanent agreements. Petitioner attempted to do so, serving notices on the respondent carriers of its desire to enter into crew consist agreements on this standard (R. 76, 82). But the carriers refused, and the Court of Appeals held that refusal proper (App. 55a-56a).

The obvious purpose of the emergency legislation was to provide an additional two-year period in which the parties would have the obligation to engage in further bargaining. President Kennedy, in his message to the Congress, asked for temporary legislation, "... for such length of time as the parties are unable to agree by collective bargaining," not to exceed two years, and Secretary of Labor Wirtz emphasized to the Senate Commerce Committee that:

> ". . . what is contemplated here is a decision which would have controlling effect during that (2 year) period until they agree. No question about it." (S. Hearings, p. 51).

The representative of the respondent carriers described the purpose of the bill most accurately, saying:

> "As I understand the resolution, it imposes a duty upon the parties to attempt to settle their differences. But at the same time it is designed to protect the public interest as a result of the establishment of these interim rules for a period of two years or less, while the parties undertake,

through collective bargaining, to bring about a more permanent solution to their problems." (S. Hearings, p. 375).

Expressions of similar understanding of the purpose of the legislation may be found at House Hearings, pp. 59-60, 81, 109, 114, 565, and at the Senate Hearings, pp. 54, 63, 364, 370-371, 412.

The Court below held, to the contrary, that the effect of the Act and of the Award was to ring down an iron curtain between the parties for a two-year period, during which all progress toward resolution of the dispute was immobilized, and at the end of which the unresolved controversy would flare anew. This is precisely what occurred.

Peculiarly, the Court below held that similar notices served by the Brotherhood of Railroad Trainmen were effective, because they proposed an agreement effective at the expiration of the Award, beginning January 26, 1966 (App. 57a-58a), but that the notices served by petitioner were invalid because they proposed agreements to become effective 30 days after the date of the notices, and nine months prior to the expiration date of the Award. (App. 55a-56a). This cannot be reconciled with the repeated statements of the President, the members of Congress, and the interested parties, that the interim two-year rules were to be effective only until the parties were able to agree, nor with the language of the Award that no change shall be made in existing rules for the duration of the Award "except by agreement." We submit that the construction of the Court below flouts the intent of Congress, and the language of the Award, and will unnecessarily prolong a dispute which could and should have been settled during the two-year period.

(3) Because of its view that the respondent carriers had no obligation to bargain with petitioner during the two-year period for the establishment of permanent crew consist rules, the Court below also held that the members of petitioner Brotherhood were properly enjoined from withdrawing from service, because of the carrier's refusal, at the end of the two-year period. (App. 86a-89a.) It so held despite Section 4 of the Norris-LaGuardia Act (App. 125a) which provides that:

> "SECTION 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing our of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;"

The dispute between the parties, arising from notices servied by the petitioner to establish agreements, was a "major" dispute. Although this Court has held that a labor organization may be enjoined (solely to maintain the status quo) during the pendency of a "minor" dispute before the National Railroad Adjustment Board, this Court has held that Section 4 of the Norris-LaGuardia Act absolutely prohibits the issuance of an injunction against a withdrawal from service by employees over a "major" dispute. In *Order of Railroad Telegraphers* v. *Chicago & Northwestern R. Co.*, 362 U.S. 330 (1960) this Court said:

> "We hold, with the District Court, that this case involves or grows out of a labor dispute within the meaning of the Norris-LaGuardia Act and that the

> District Court was without jurisdiction permanently to enjoin the strike.
>
> Section 4 of the Norris-LaGuardia Act specifically withdraws jurisdiction from a District Court to prohibit any person or persons from '[c]easing or refusing to perform any work or to remain in any relation of employment' 'in any case involving or growing out of any labor dispute' as 'herein defined.' "

See also: *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U.S. 30, footnote 24; *Elgin, Joliet & Eastern Railway Co.* v. *Brotherhood of Railroad Trainmen*, 302 F. 2d 540 (C.A. 7, 1962) cert. den. 371 U.S. 823; *Chicago, Rock Island & Pacific R. Co.* v. *Switchmen's Union*, 292 F. 2d 61 (C.A. 2, 1961) cert. den. 370 U.S 936; *Missouri-Illinois R. Co.* v. *Order of Railway Conductors*, 322 F. 2d 793 (C.A. 8, 1963); *Pullman Co.* v. *Orders of Railway Conductors*, 316 F. 2d 556 (C.A. 7, 1963).

Further, although the Court below found that the respondent carriers refused to meet and negotiate with petitioner during the two-year period, it also held that Section 8 of the Norris-LaGuardia Act was not applicable. Section 8 (App. 128a) provides that:

> "SECTION 8. No restraining order or injunction relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

The reasoning of the Court of Appeals was that Section 8 was not applicable because the respondent car-

riers had no statutory obligation to negotiate with petitioner during the two-year period (App. 89a). This holding is in square conflict with the decision of this Court in *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R. R.*, 321 U.S. 50 (1944). In that case this Court held that a carrier, which had engaged in the negotiation and mediation of a major dispute as required by law, but which had refused to submit the dispute to arbitration, which was available but not required by law, was barred by the language of Section 8 from obtaining an injunction against a withdrawal from service by a labor organization. This Court said:

> "It (the Norris-LaGuardia Act) sought to make injunction a last line of defense, available not only after other legally required methods, but after all reasonable methods as well, have been tried and found wanting. This purpose runs throughout the Act's provisions. . . . Without question, as respondent says, arbitration under the Railway Labor Act is voluntary. . . . Respondent's failure or refusal to arbitrate has not violated any obligation imposed upon it, whether by the Railway Labor Act or by the Norris-LaGuardia Act. No one has recourse against it by any legal means on account of this failure. Respondent is free to arbitrate or not, as it chooses. But if it refuses, it loses the legal right to have an injunction issued by a federal court or, to put the matter more accurately, it fails to perfect the right to such relief. This is not compulsory arbitration. It is compulsory choice between the right to decline arbitration and the right to have the aid of equity in a federal court. . . Arbitration under the Railway Labor Act was available, afforded a method for settlement Congress itself has provided, and until respondent accepted this method it has not made 'every reasonable effort to settle' the dispute, as Section 8 requires."

To the same effect see: *Hilbert* v. *Pennsylvania R. Co.*, 290 F. 2d 881 (C.A. 7, 1961); *Westchester Lodge 2186, etc.* v. *Railway Express Agency*, 329 F. 2d 748 (C.A. 2, 1964); *Manion* v. *Kansas City Terminal Railway Co.*, 353 U.S. 706 (1957).

The holding of the Court below that Section 8 did not disqualify the respondent carriers from injunctive relief because negotiation with petitioner was not required by law, was plainly contrary to the prior holdings of this Court.

(4) Portions of the rulings of the Court below construing P.L. 88-108, the Award of Arbitration Board No. 282, and the Norris-LaGuardia Act, are squarely in conflict with the prior decisions of this Court in *Brotherhood of Locomotive Engineers* v. *Chicago, Rock Island & Pacific R. Co.*, 382 U.S. 423 (1966); *Order of Railroad Telegraphers* v. *Chicago and Northwestern R. Co.*, 362 U.S. 330 (1960); and *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R. R.*, 321 U.S. 50 (1944). Other portions of the decisions below decide important questions of Federal law which have not been, but should be, settled by this Court. The decisions below adversely affect 7,574 trainmen, and leave in complete confusion the status of the remainder of the total national trainmen workforce of 122,000 persons. Further, we invite to the attention of the Court that, since the enactment of Public Law 88-108, the Congress has enacted similar emergency legislation to avert another national railroad work stoppage involving the shopcraft unions. P.L. 90-54, July 17, 1967. The legitimate concern of the President, the Congress, and of the public over the interruption of essential transportation services occasioned by labor disputes is well known. If such emergency legislation

is to become a way of life in the transportation industry, the carriers of the various modes and their millions of employees are entitled to know its meaning and consequences. They, as well as the Congress itself, are entitled to know whether a Congressional limitation of two years is meaningless, whether the parties have any obligation to attempt to dispose of the dispute during the moratorium period, and what are the consequences of the expiration of the emergency legislation These questions are crucial to the lives and fortunes of millions of workmen in the transportation industry. Although this Court sustained the validity of such emergency legislation in *Wilson* v. *New,* 243 U.S. 332 (1917), it later said that "It is not too much to say that the ruling in Wilson v. New went to the borderline, although it concerned an interstate common carrier in the presence of a nation-wide emergency and the possibility of great disaster." (*Wolf Packing Co.* v. *Court of Industrial Relations,* 262 U.S. 522, 544 (1923). And Mr. Justice Holmes said of similar emergency enactments that "they went to the verge of the law, . . ." (*Pennsylvania Coal Company* v. *Mahon,* 260 U.S. 393, 416 [1922].) The issues herein are of sufficient importance to warrant final disposition by this Court.

JAMES D. HILL
HARRY E. WILMARTH
Attorneys for Petitioner

November 27, 1967

INDEX

Table of Contents

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statement of the Case	2
Argument	4
Conclusion	12

Table of Citations

Cases:

American Airlines, Inc. v. *Air Line Pilots Ass'n Inter.*, 169 F. Supp. 777, (S.D.N.Y., 1958)	10
Benitez v. *Anciani*, 127 F.2d 121 (1st Cir., 1942)	6
Brotherhood of Loc. Fire. & Eng. v. *Bangor and Aroostook R. Co.*, 380 F.2d 570 (D.C. Cir., 1967)	7
Chicago River & Indiana R. Co. v. *Brotherhood of Rail T.*, 229 F.2d 926 (7th Cir., 1956)	11
Chicago, Rock Island & P. R. Co. v. *Switchmen's Union*, 187 F. Supp. 581 (W.D. N.Y., 1960)	10
Chicago, Rock Island & Pacific R. Co. v. *Switchmen's Union*, 292 F.2d 61 (2d Cir., 1961)	10
Eastern Air Lines, Inc. v. *Flight Engineers International Ass'n*, 340 F.2d 104 (5th Cir., 1965)	11
Elgin, J. & E. Ry. Co. v. *Brotherhood of Railroad Trainmen*, 302 F.2d 540 (7th Cir., 1962)	10
Elgin, J. & E. R. Co., v. *Burley*, 325 U.S. 711 (1945)	10
Graham v. *Brotherhood of Firemen*, 338 U.S. 232 (1949)	9
International Garment Work. Un. v. *Donnelly G. Co.*, 147 F.2d 246 (8th Cir., 1945)	8
Lawrence v. *St. L.-S.F. Ry.*, 278 U.S. 228 (1929)	8
Locomotive Engineers v. *B. & O. R. Co.*, 372 U.S. 284 (1963)	10

Page

Locomotive Engrs. v. *L. & N. R. Co.*, 373 U.S. 33 (1963) 9
Locomotive Engineers v. *M.-K.-T. R. Co.*, 363 U.S. 528 (1960) 9
Manning v. *American Airlines, Inc.*, 329 F. 2d 32 (2d Cir., 1964) 11
Missouri-Illinois R. Co. v. *Order of Railway Conductors*, 322 F. 2d 793 (8th Cir., 1963) 10
Norfolk & P.B. L. R. Co. v. *Brotherhood of Rail. Train.*, 248 F. 2d 34 (4th Cir., 1957) 10
Pan American World Air v. *Flight Eng. Inter. Assoc.*, 306 F. 2d 840 (2d Cir., 1962) 11
Pennsylvania Railroad Co. v. *Transport Workers Union*, 191 F. Supp. 915 (E.D. Pa., 1960) 10
Pennsylvania Railroad Co. v. *Transport Wkrs. Union*, 202 F. Supp. 134 (E.D. Pa., 1962) 10
Pullman Co. v. *Order of Railway Conductors and Brakemen*, 316 F. 2d 556 (7th Cir., 1963) 10
Railroad Trainmen v. *Howard*, 343 U.S. 768 (1952) 9
Railroad Yardmasters v. *Pennsylvania Railroad Co.*, 224 F. 2d 226 (3d Cir., 1955) 11
Railway Clerks v. *Florida E.C.R. Co.*, 384 U.S. 238 (1966) 10
Southard & Co. v. *Salinger*, 117 F. 2d 194 (7th Cir., 1941) 6
Southern Ry. Co. v. *Brotherhood of Locomotive Firemen, Etc.*, 337 F. 2d 127 (D.C. Cir., 1964) 11
Telegraphers v. *Chicago & N.W. R. Co.*, 362 U.S. 330 (1960) 9
Textile Workers v. *Lincoln Mills*, 353 U.S. 448 (1957) 9
Trainmen v. *Chicago R. & I.R. Co.*, 353 U.S. 30 (1957) 7, 9, 11
Trainmen v. *Toledo P. & W. R. Co.*, 321 U.S. 50 (1944) 10, 12
Tunstall v. *Brotherhood*, 323 U.S. 210 (1944) 9
United Motors Service v. *Tropic-Aire*, 57 F. 2d 479 (8th Cir., 1932) 8
Virginian Ry. v. *Federation*, 330 U.S. 515 (1937) 9

Page

Western Air Lines v. *Flight Engineers Internat'l Ass'n*, 194 F. Supp. 908 (S.D. Cal., 1961) 10

Statutes:

29 U.S.C. § 104 ..... 7, 9, 11
29 U.S.C. § 108 ..... 7, 8, 9, 11, 12
45 U.S.C. § 156 ..... 3, 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 862

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, *Petitioner,*

v.

THE AKRON & BARBERTON BELT RAILROAD COMPANY, *et al., Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinions of the District Court (Appendices A and C to Petition) are reported at 250 F. Supp. 691 and 253 F. Supp. 538. The opinions of the Court of Appeals (Appendices E and F to Petition) have not yet been officially reported, but are unofficially reported at 55 CCH Labor Cases ¶ 11,912 and 56 CCH Labor Cases ¶ 12,095.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

1. Upon the expiration of the two-year period in which the Award by Arbitration Board No. 282 "shall continue in force," do the modifications in prior crew-consist agreements and rules made by or pursuant to the Award continue to apply until changed in accordance with the Railway Labor Act, or do the prior agreements and rules automatically revive and apply thereafter until changed in accordance with the Railway Labor Act?

2. Could a union subject to the Award elect, prior to the expiration thereof, to proceed under the procedures established by the Railway Labor Act rather than under the procedures established by the Award with respect to proposed changes in crew-consist agreements and rules?

3. Does Section 4 of the Norris-LaGuardia Act (29 U.S.C. § 104) deprive the federal courts of jurisdiction to grant injunctive relief enforcing the mandates of the Railway Labor Act?

4. If Section 8 of the Norris-LaGuardia Act is applicable to injunctions intended to require compliance with the mandates of the Railway Labor Act, did petitioner establish that respondents failed to comply with the said Section 8?

Statement of the Case

Respondents herein are the petitioners in No. 863, which relates to the same judgment and proceeding below. We respectfully refer the Court to the Statement of the Case in that petition for a more adequate and accurate description of the relevant facts than is contained in the instant petition. Insofar as the Statement of the Case is comprised of a discussion of the legislative history of P.L. 88-108 and other legal arguments, we deal briefly with such matters in the Argument section of this brief. Since the petition in No. 863 concerns the Brotherhood of Railroad

Trainmen (BRT) and the Switchmen's Union of North America (SUNA) as well as the Order of Railway Conductors and Brakemen (ORC&B), we note below certain facts pertinent only to this petitioner.

Unlike the BRT and SUNA, the ORC&B did not enter into any agreements pursuant to Award 282 and was not subject to any special board awards pursuant to Award 282. The parties, therefore, did not list any such agreements or awards in the Stipulation (JA 74-81) [1] which constituted (together with exhibits thereto) the record upon which the case was determined with respect to the ORC&B. Consequently, the issue as to the agreements and rules in effect following the expiration of Award 282 is of only academic interest to this petitioner.

The notices of proposed changes in crew-consist agreements and rules served by the ORC&B during the period of the Award were not served "[p]ursuant to the command of the Board [Arbitration Board No. 282] . . ." as is stated in the petition, at 7. Those notices expressly stated (JA 82) that they were "[p]ursuant to Section 6 of the Railway Labor Act", the parties so stipulated (JA 76), the ORC&B so conceded in the court below (Brief, at 6, 30), and it subsequently admits in the instant petition (p. 9) that the "notices [were] served under Section 6 of the Railway Labor Act." Thus, when the carriers concerned refused to agree to the proposals in those notices, the ORC&B sought to invoke the services of the National Mediation Board rather than refer the dispute to a special board of adjustment as provided in Award 282 (Pet., at 7; JA 78-79; Pet., App. I, at 104a-106a). As petitioner concedes (Pet., at 17), those Section 6 notices provided that the proposals therein were to become effective 30 days

[1] JA references are to the Joint Appendix in Dockets Nos. 20,158 and 20,191 below.

after service of the notices, which was some 9 months prior to the expiration of Award 282 (JA 76, 82).

The Section 6 notices served by petitioner proposed to establish a rule requiring the use of at least one conductor and two brakemen on all train crews in road service (JA 76). Since the use of at least one conductor already was required by existing agreements and rules (which requirement was not affected by Award 282), the only change proposed related to the number of brakemen. The ORC&B did not represent road brakemen on some 44 of the 54 carriers served with its Section 6 notice, and those carriers took the position that the notice was invalid for that reason as well as being premature (JA 74-78, 83-84). The parties stipulated that that issue would not be litigated in this proceeding, but could be raised in some other proceedings, and the issue was not considered by the courts below (JA 81, 173-174).

Argument

1. Petitioner's contention (Pet., at 10-16) that the court below erred in holding that the crew-consist rules established pursuant to Award 282 continue to apply until changed in accordance with the Railway Labor Act is, we believe, completely without foundation. Some of our reasons for that belief are set forth in the petition in No. 863, at 12-27.

For present purposes, however, it does not matter whether the court below erred in that regard or as to whether the issue has sufficient importance to merit review by this Court. This petitioner—the ORC&B—is not affected by the ruling below on that issue as it was not a party to any agreements or special board awards pursuant to Award 282. Thus, no crew-consist rules affecting petitioner were established pursuant to the Award so as to continue to apply under the decision below. Moreover, the

ORC&B will be in a position to present its arguments on the principles involved if the petition in No. 863 is granted, even though the instant petition be denied. The ORC&B is included among the respondents to that petition because one of the issues there presented—whether or not the procedures established by Award 282 continue to apply until changed in accordance with the Railway Labor Act—does affect the ORC&B as well as the other crew-consist unions. In the courts below, the ORC&B opposed the carrier's contention that those procedures continue to apply on the ground that, as argued in the instant petition, the Congress intended the Award to have no effect whatsoever following its expiration.

2. In our view, the purpose and effect of the expiration date in Award 282 was to place a moratorium upon proceedings pursuant to the Railway Labor Act during the two-year period of the Award and to permit the parties, after that period expired, to proceed under the Act with respect to Section 6 notices proposing changes in crew-consist rules. See the petition in No. 863, at 23-27. The ORC&B not only sought to bargain under the Railway Labor Act during the period of the Award with respect to such notices, but sought to make the crew-consist rules proposed therein effective during the period of the Award. In effect, therefore, petitioner contends that the Award could be ignored altogether. Instead of having any disputes over its proposals decided by a special board of adjustment, as the Award provides, the ORC&B would have been in a position to enforce its demands by strikes, even during the period of the Award, if that contention were correct.

We do not believe, therefore, that there is any merit in petitioner's contention that the court below erred in holding that its Section 6 notices were premature (Pet., at

16-17). But once again, it does not make any significant practical difference to petitioner whether that holding was right or wrong. The judgment of the District Court, which was affirmed in this regard by the Court of Appeals, provides that the Section 6 notices served by the ORC&B "were not nullities but were premature and did not become effective under the Railway Labor Act until January 26, 1966—the day after the expiration of the Award of Arbitration Board No. 282" (JA 172). Hence, insofar as any issues involved in this case are concerned, petitioner has been free since January 25, 1966 to proceed with its notices under the Railway Labor Act.[2]

3. The trial court issued a temporary restraining order preventing the unions, including the ORC&B, from striking the carriers over any dispute as to the agreements and rules in effect following expiration of the Award, pending hearing upon a motion for a preliminary injunction (JA 28-30). The parties agreed, however, to submit the case for final decision upon a stipulated record, and the carriers did not further press their prayer for injunctive relief. Hence, the judgment entered by the trial court merely declared the rights of the parties and did not enjoin anyone (JA 167-174).

In view of those developments, the carriers urged in the court below that any issues as to the applicability of the Norris-LaGuardia Act were moot. See *Benitez* v. *Anciani*, 127 F. 2d 121, 125 (1st Cir., 1942); *Southard & Co.* v. *Salinger*, 117 F. 2d 194, 196 (7th Cir., 1941). That court thought, however, that the unions might be able to prove some damages from the temporary restraining order which would be recoverable upon the $10,000 bond posted pursuant to that order, if the order were found to be invalid,

[2] As we have noted (p. 4, *supra*), those notices may be invalid for reasons which have been stipulated out of this case.

and thus it passed upon the Norris-LaGuardia issues (Pet., App. F, at 86a-89a).

The court below was "clear that the District Court was correct in holding that it had jurisdiction to enjoin a violation of the Railway Labor Act, and that this jurisdiction was not negatived by or subject to Section 4 of the Norris-LaGuardia Act" (Pet., App. F, at 86a).[3] But, that court also held that *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30 (1957), established a "principle of accommodation" between the two statutes which "means that actions to enjoin violations of the Railway Labor Act may be maintained without regard to Section 4 of the Norris-LaGuardia Act, and yet be subject to Section 8 of that Act" (Pet., App. F, at 87a). The court concluded that the temporary restraining order was invalid insofar as it applied to the BRT because the carriers had not complied with Section 8 of Norris-LaGuardia with respect to that union, but there was no failure to comply with Section 8 with respect to the ORC&B so that the temporary restraining order was not invalid insofar as it applied to that union (Pet., App. F, at 89a).

This difference in result as between the two unions turned upon the differing conclusions reached by the court below as to the duty of the carriers to bargain upon the Section 6 notices served by the unions during the period of the Award. The court held that the carriers did have a duty to bargain with the BRT upon its notices which proposed changes in crew-consist rules to become effective after expiration of the Award, but did not have such a duty with respect to the notices served by the ORC&B which proposed changes in crew-consist rules to become effective

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[3] In so holding, the court "adhered" to its ruling on a similar issue in "No. 20316" (Pet., App. F., at 86a), which is reported as *Brotherhood of Loc. Fire. & Eng.* v. *Bangor & Aroostook R. Co.*, 380 F. 2d 570, 582-584 (D.C. Cir., 1967), cert. den., No. 353 (O. T., 1967).

during the period of the Award (Pet., App. E, at 47a-58a). Hence, the carriers "failed to comply with [an] obligation imposed by law which is involved in the labor disputes in question" (29 U.S.C. § 108) insofar as the BRT is concerned (if Section 8 of Norris-LaGuardia is applicable, as the court held), but not insofar as the ORC&B is concerned.

The Norris-LaGuardia issues have little immediate importance to any of the parties. As we have noted, the temporary restraining order expired long ago by its own terms, and no further injunctive relief was entered. The ORC&B does not claim in its petition that it incurred any damages as a result of the temporary restraining order which could be recovered upon the bond if that order was invalid, and we doubt if any significant damages could be proven. As the ORC&B states (Pet., at 8), it denied "that any strike was intended" so that the temporary restraining order only required it to refrain from doing what it said it did not intend to do in any event. But at most recoverable damages would be limited to the $10,000 amount of the bond, which amount would have to be shared by both unions.[4]

In our petition in No. 863 (p. 32), we also pointed out that the Norris-LaGuardia issue there presented "has little immediate importance to the parties." We urged, nevertheless, that this Court should review the holding below that Section 8 of Norris-LaGuardia may apply to injunctions requiring compliance with the mandates of the Railway Labor Act, because that holding conflicts in principle with decisions of this Court and of other courts of appeals and is important to the administration of the Norris-LaGuardia and Railway Labor Acts (Pet. in No.

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[4] See, *e.g.*, *Lawrence* v. *St. L.-S.F. Ry.*, 278 U.S. 228, 233 (1929); *International Garment Work. Un.* v. *Donnelly G. Co.*, 147 F. 2d 246, 253 (8th Cir., 1945); *United Motors Service* v. *Tropic-Aire*, 57 F. 2d 479 (8th Cir., 1932).

863, at 27-32). The Norris-LaGuardia rulings sought to be reviewed by the ORC&B, however, do not involve any such conflicts or general importance. The holding that Section 4 of Norris-LaGuardia does not apply to injunctions requiring compliance with the mandates of the Railway Labor Act accords with numerous decisions by this Court, and the holding that the carriers complied with Section 8 of Norris-LaGuardia insofar as the ORC&B is concerned involves only the application of that Section to the facts of this particular case.

Section 4 of Norris-LaGuardia (29 U.S.C. § 104) deprives the federal courts of jurisdiction to enjoin certain specified activities in connection with labor disputes subject to the Act, including "[c]easing or refusing to perform any work or to remain in any relation of employment;" *i.e.*, strikes. But this Court has consistently held "that the Norris-LaGuardia Act does not deprive federal courts of jurisdiction to compel compliance with the mandates of the Railway Labor Act." *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 458 (1957). See *Railroad Trainmen* v. *Howard*, 343 U.S. 768, 774 (1952); *Graham* v. *Brotherhood of Firemen*, 338 U.S. 232, 237-240 (1949); *Tunstall* v. *Brotherhood*, 323 U.S. 210 (1944); *Virginian Ry.* v. *Federation*, 300 U.S. 515, 563 (1937). Thus, the court on several occasions has upheld the jurisdiction of the federal courts to enjoin strikes in violation of the Railway Labor Act despite the provisions of Norris-LaGuardia. *Locomotive Engrs.* v. *L. & N. R. Co.*, 373 U.S. 33, 42 (1963); *Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U.S. 528, 531 (1960); *Trainmen* v. *Chicago, R. & I. R. Co.*, 353 U.S. 30(1967).

Telegraphers v. *Chicago & N.W. R. Co.*, 362 U.S. 330 (1960), relied upon by petitioner (Pet., at 18-19), is not to the contrary. In that case, the "major" dispute procedures of the Railway Labor Act had been exhausted (362

U.S., at 349-351), so that no violation of the Railway Labor Act was involved once it was established—as this Court held—that the Section 6 notices in question were valid and bargainable. Insofar as "major" disputes over proposed changes in "agreements affecting rates of pay, rules, or working conditions" (45 U.S.C. § 156) are concerned, the "parties are required to submit to the successive procedures designed to induce agreement," but "compulsions go only to insure that those procedures are exhausted before resort can be had to self help." *Elgin, J. & E. R. Co.*, v. *Burley*, 325 U.S. 711, 725 (1945). Once those procedures have been exhausted, the parties are free to resort to self help, including strikes, without violating the Railway Labor Act. *Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238, 243-244 (1966); *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284, 291 (1963).

The lower court decisions cited by petitioner (Pet., at 19) also involved situations in which the procedures of the Railway Labor Act had been exhausted with respect to major disputes, so that the strikes in question did not violate the mandates of that Act.[5] In situations such as that involved here, where the major disputes procedures of the Railway Labor Act have not been exhausted so that a strike violates the Act, the courts have consistently held that Norris-LaGuardia does *not* bar an injunction against such a strike. *Norfolk & P.B. L. R. Co.* v. *Brotherhood of Rail. Train.*, 248 F. 2d 34, 45-46 (4th Cir.; 1957); *Pennsylvania Railroad Co.* v. *Transport Wkrs. Union*, 202 F. Supp. 134, 137 (E.D. Pa., 1962); *Western Air Lines* v. *Flight Engineers Internat'l Ass'n.*, 194 F. Supp. 908, 910-911 (S.D. Cal., 1961); *Pennsylvania Railroad Co.* v. *Trans-*

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[5] See 302 F. 2d 540, 543; 292 F. 2d 61; 322 F. 2d 793, 795, 798; 316 F. 2d 556, 563, 564. Footnote 24 in *Trainmen* v. *Chicago R. & I.R. Co.*, 353 U.S. 30, 42 (1957), also referred to such a situation, as is shown by the citation of *Trainmen* v. *Toledo P. & W. R. Co.*, 321 U.S. 50 (1944). See fn. 7, p. 12, *infra*.

port Workers Union, 191 F. Supp. 915, 921 (E.D. Pa., 1960), aff'd, 280 F. 2d 343 (3d Cir., 1960); *Chicago, Rock Island & P. R. Co.* v. *Switchmen's Union*, 187 F. Supp. 581, 584 (W.D. N.Y., 1960), rev'd on other grounds, 292 F. 2d 61 (2d Cir., 1961); *American Airlines, Inc.* v. *Air Line Pilots Ass'n Inter.*, 169 F. Supp. 777, 783-789 (S.D.N.Y., 1958).[6] In short, the court below simply applied well-settled law in holding that Section 4 of Norris-LaGuardia did not deprive the District Court of jurisdiction to enjoin a violation of the Railway Labor Act.

For the reasons summarized in the petition in No. 863 (pp. 27-32), we believe that the court below erred in holding that Section 8 of Norris-LaGuardia (29 U.S.C. § 108) is applicable, even though Section 4 is not, to injunctions requiring compliance with the mandates of the Railway Labor Act. But that error favored the ORC&B and it asks only that this Court review the holding that the carriers complied with Section 8 insofar as the ORC&B is concerned. The only error suggested in that regard (Pet., at 18-21) is the ruling that the carriers were not required to bargain during the period of the Award upon the Section 6 notices served by the ORC&B. We have demonstrated (pp. 5-6, *supra*) that that ruling is correct and is not worthy of review by this Court. Petitioner's contention (Pet.,

[6] Many other opinions have stated in *dicta* that Norris-LaGuardia does not bar an injunction against a strike in such circumstances. *E.g., Eastern Air Lines, Inc.* v. *Flight Engineers International Ass'n*, 340 F. 2d 104, 106 (5th Cir., 1965); *Pan American World Air.* v. *Flight Eng. Inter. Assoc.*, 306 F. 2d 840, 846 (2nd Cir., 1962); *Chicago River & Indiana R. Co.* v. *Brotherhood of Rail T.*, 229 F. 2d 926, 930-931 (7th Cir., 1956), aff'd, 353 U.S. 30 (1957). And, the courts have held in the converse situation, where a carrier has not exhausted the major dispute procedures of the Railway Labor Act, that Norris-LaGuardia does not bar an injunction against the carrier. *E.g., Southern Ry. Co.* v. *Brotherhood of Locomotive Firemen, Etc.*, 337 F. 2d 127, 132-133 (D.C. Cir., 1964); *Manning* v. *American Airlines, Inc.*, 329 F. 2d 32, 34 (2d Cir., 1964); *Railroad Yardmasters* v. *Pennsylvania Railroad Co.*, 224 F. 2d 226, 228 (3d Cir., 1955).

at 20) that that ruling "is in square conflict with the decision" in *Trainmen* v. *Toledo P. & W. R. Co.*, 321 U.S. 50 (1944), is obviously inaccurate. That was not a case, such as is involved here, in which the union attempted to nullify P.L. 88-108 and Award 282 by utilizing the procedures of the Railway Labor Act rather than those required by the Award to bring about changes in crew-consist rules.[7]

Conclusion

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005
Of counsel for respondents.

FRANCIS M. SHEA
RICHARD T. CONWAY
734 Fifteenth Street, N.W.
Washington, D.C. 20005

JAMES R. WOLFE
Union Station Building
Chicago, Illinois 60606
Attorneys for respondents.

(3190-6)

[7] In the *Toledo* case, the procedures of the Railway Labor Act had been exhausted with respect to a valid Section 6 notice (see 321 U.S., at 51-52), so that a violation of the Railway Labor Act was not involved. Rather, the injunction was sought under Norris-LaGuardia itself by reason of violence in connection with the strike, and there was no question about the fact that Section 8 of Norris-LaGuardia was applicable. The holding was that the carrier failed to comply with Section 8 when it refused a request that it submit the dispute to arbitration. The cases cited at the top of page 21 of the petition as being to the "same effect" as the *Toledo* case actually involved different issues, but also have no resemblance to the instant case.

SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 863

THE AKRON & BARBERTON BELT RAILROAD COMPANY, et al., *Petitioners,*

v.

BROTHERHOOD OF RAILROAD TRAINMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, SWITCHMEN'S UNION OF NORTH AMERICA, AND BILL DOAK LODGE DIVISION 584, BROTHERHOOD OF RAILROAD TRAINMEN, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005
Of Counsel for Petitioners.

FRANCIS M. SHEA
RICHARD T. CONWAY
734 Fifteenth Street, N.W.
Washington, D.C. 20005

JAMES R. WOLFE
Union Station Building
Chicago, Illinois 60606
Attorneys for Petitioners.

INDEX

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	3
Statutes Involved	4
Statement of the Case	4
Reasons for Granting the Writ	11
A. This Court Should Review the Holding that the Procedures Established by the Award for Changing Crew-Consist Rules Could Neither Be Initiated Nor Completed after Expiration of the Award and the Holding that Petitioners Could Be Required to Bargain under the Railway Labor Act during the Period of the Award upon Proposed Changes in Crew-Consist Rules	12
1. The Congress adopted the provisions of the Railway Labor Act	12
2. Under the Railway Labor Act, the rights and duties of the parties to a collective bargaining agreement or arbitration award continue after its termination until changed in accordance with the Act	16
3. Under the Railway Labor Act, the purpose and effect of a termination date in a collective bargaining agreement or arbitration award is to preclude the parties from being required under the Act to bargain prior to such termination date about proposed changes in the agreement or award	23
B. This Court Should Review the Holding that Section 8 of the Norris-LaGuardia Act Invalidated A Temporary Restraining Order Entered by the Court Below	27
Conclusion	33

Table of Citations

Cases:

	Page
Benitez v. *Anciani*, 127 F. 2d 121 (1st Cir., 1942)	32
Brotherhood of Locomotive Eng. v. *Baltimore & Ohio R. Co.*, 310 F. 2d 503 (7th Cir., 1962), aff'd, 372 U.S. 284 (1963)	4
Brotherhood of Loc. Eng. v. *Chicago & North Western Ry. Co.*, 314 F. 2d 424 (8th Cir., 1963)	22
Brotherhood of Loc. Fire. & Eng. v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11 (D. D.C., 1964) aff'd. per curiam, 331 F. 2d 1020 (D.C. Cir., 1964)	6, 15
Brotherhood of Railroad Carmen v. *Chicago & N.W. Ry. Co.*, 354 F. 2d 786 (8th Cir., 1965)	29, 32
Brotherhood of Railroad Train. v. *Denver & R.G.W.R. Co.*, 354 F. 2d 786 (8th Cir., 1965)	31
Capitol Airways, Inc., v. *Air Line Pilots Ass'n.*, 41 CCH Labor Cases ¶16,739 (Md. Tenn., 1961)	24
Chicago, Rock Island & Pacific R. Co., v. *Switchmen's Union*, 292 F. 2d 61 (2d Cir., 1961)	29
Elgin, J. & E. Ry. Co., v. *Brotherhood of Railroad Trainmen*, 302 F. 2d 540 (7th Cir., 1962)	29
Felter v. *Southern Pacific Co.*, 359 U.S. 326 (1959)	17
Flight Engineers' Inter. Ass'n., v. *American Airlines, Inc.*, 303 F. 2d 5 (5th Cir., 1962)	23
Graham v. *Brotherhood of Firemen*, 338 U.S. 232, 237-240 (1949)	30, 31
Labor Board v. *American Ins. Co.*, 343 U.S. 395, 408-409 (1952)	22
Locomotive Engineers v. *B. & O. R. Co.*, 372 U.S. 284 (1963)	5, 6, 22
Locomotive Engrs. v. *L. & N. R. Co.*, 373 U.S. 33, 42 (1963)	30
Manning v. *American Airlines, Inc.*, 221 F. Supp. 301 (S.D.N.Y., 1963)	29
Manning v. *American Airlines, Inc.*, 329 F. 2d 32 (2d Cir., 1964)	17, 18, 20
Missouri-Kansas-Texas R. Co., v. *Brotherhood of Loc. Eng.*, 266 F. 2d 335 (5th Cir., 1959)	31
Railway Clerks v. *Florida E. C. R. Co.*, 384 U.S. 238 (1966)	16, 22, 29

Page

Railroad Passenger Train Deficit, 306 I.C.C. 417 (1959) 4
Railroad Trainmen v. *Howard*, 343 U.S. 768 (1952) 30
Rutland Ry. v. *Brotherhood of Loc. Eng.*, 307 F. 2d 21 (2d Cir., 1962) 24, 29
Southard & Co., v. *Salinger*, 117 F. 2d 194 (7th Cir., 1941) 32
Steele v. *L. & N. R. Co.*, 323 U.S. 192 (1944) 30
St. Louis S. F. & T. Ry. Co., v. *Railroad Yardmasters of America*, 328 F. 2d 749 (5th Cir., 1964) 21
Telegraphers v. *Chicago & N.W. R. Co.*, 362 U.S. 330 (1960) 21, 31
Textile Workers v. *Lincoln Mills*, 353 U.S. 448 (1957) 30, 31
Trainmen v. *Chicago, R. & I. R. Co.*, 353 U.S. 30 (1957) 29, 31
Trainmen v. *Toledo, P. & W. R. Co.*, 321 U.S. 50 (1944) 30
Tunstall v. *Brotherhood*, 323 U.S. 210 (1944) 16
Union Pacific R. Co. v. *Price*, 360 U.S. 601 (1959) 17
United Indus. Wkrs. of Seafarers, Etc., v. *Board of Trustees*, 351 F. 2d 183 (5th Cir., 1965) 30, 31
United States v. *Mine Workers*, 330 U.S. 258 (1947) 30
Virginian Ry. v. *Federation*, 300 U.S. 515 (1937) 30, 31
Westchester Lodge 2187, Etc. v. *Railway Express Agency*, 329 F. 2d 748 (2d Cir., 1964) 20

Statutes:

Public Law 88-108:

Section 3 6
Section 4 ..... 6, 14
Section 6 15

Railway Labor Act:

Section 3 24
Section 6 ..... 4, 17, 19, 20, 22
Section 7 ..... 6, 14, 17
Section 8 ..... 6, 14, 17
Section 9 14
Section 10 5

Norris-LaGuardia Act:

	Page
Section 4	28
Section 7	28, 31
Section 8	10, 11, 27, 28, 31
Section 9	28, 31
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	9
28 U.S.C. § 1337	9
28 U.S.C. § 2201	9
28 U.S.C. § 2202	9

Miscellaneous:

H. J. Res. 565 and S. J. Res. 102, 88th Cong., 1st Sess.	12
H. Rept. No. 713, 88th Cong., 1st Sess.	5
S. Rept. No. 459, 88th Cong., 1st Sess.	14
109 Cong. Rec. 15279	16, 26
75 Cong. Rec. 5499	30
Hearings on H. J. Res. 565 before the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess.	13, 14
Hearings on S. J. Res. 102 before the Senate Committee on Commerce, 88th Cong., 1st Sess.	13, 14
Report of the Presidential Railroad Commission (1962)	5
Opinion of Neutral Members, 41 Labor Arbitration 680 (1963)	7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No.

THE AKRON & BARBERTON BELT RAILROAD COMPANY, et al., *Petitioners,*

v.

BROTHERHOOD OF RAILROAD TRAINMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, SWITCHMEN'S UNION OF NORTH AMERICA, AND BILL DOAK LODGE DIVISION 584, BROTHERHOOD OF RAILROAD TRAINMEN, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on July 31, 1967.

Opinions Below

Petitioners are 178 railroads which filed a complaint for declaratory judgment and injunctive relief against respondents in the United States District Court for the District of Columbia. The District Court issued a pre-trial opinion concerning certain general issues of law involved in the

case which is reported at 250 F. Supp. 691 and is set forth in Appendix A hereto. After a final hearing upon a stipulated record with respect to all of the respondents except the Order of Railway Conductors and Brakemen (ORC&B), the District Court issued a second opinion which is reported at 252 F. Supp. 207 and is set forth in Appendix B hereto. After a final hearing upon a stipulated record with respect to the ORC&B, the District Court issued a third opinion which is reported at 253 F. Supp. 538 and is set forth in Appendix C hereto. A motion for supplemental relief by certain carriers against the Brotherhood of Railroad Trainmen (BRT) resulted in a fourth opinion by the District Court which is reported at 254 F. Supp. 306 and is set forth in Appendix D hereto.

Both sides appealed from the various orders entered by the District Court (except that only the BRT appealed from the order on the motion for supplemental relief), which appeals were heard and decided togther in an opinion dated May 12, 1967 and a supplemental opinion dated July 31, 1967.[1] Those opinions have not yet been officially reported, but are unofficially reported at 55 CCH Labor Cases ¶ 11,912 and 56 CCH Labor Cases ¶ 12,095, and are set forth in Appendices E and F hereto.

Jurisdiction

The judgment of the Court of Appeals, set forth in Appendix G hereto, was entered on July 31, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] Those opinions also relate to appeals from another District Court proceeding between the carriers and the Brotherhood of Locomotive Firemen and Enginemen which involved the firemen's aspects (Article II) of Award 282. A petition for rehearing and for clarification filed by the carriers in that case was denied on September 21, 1967. Appendix H hereto. The carriers expect to file a petition for writ of certiorari in that case within 90 days from that date.

By order dated October 19, 1967, the Chief Justice extended until November 28, 1967 the time in which this petition may be filed.

Questions Presented

Article III of the Award by Arbitration Board No. 282 (Appendix I hereto) pursuant to Public Law 88-108 (77 Stat. 132) provided, among other things, that no "change shall be made in the scope or application of rules in effect immediately prior to the effective date of this Award . . . which require a stipulated number of trainmen . . . in any class of road service . . . or which require a stipulated number of brakemen or helpers in any class of yard, transfer, or belt line service . . ., except by agreement, or pursuant to the provisions of this Award." Article III also established a procedure, commencing with written notices of proposed changes, whereby such rules could be modified by agreement or by an award of a special board of adjustment "pursuant to the provisions of this Award." The period during which Article III of the Award "shall continue in force" expired as of the end of January 25, 1966.

1. Could a union party to the Award serve carrier parties to the Award with notices of proposed changes in rules requiring a specified number of trainmen, brakemen or helpers under Section 6 of the Railway Labor Act (45 U.S.C. § 156), rather than under Article III of the Award, and require the carriers to bargain upon such notices during the period prior to the expiration of the Award, when such notices proposed that the changes become effective after the expiration of the Award, or were those notices premature so as not to become effective under Section 6 of the Railway Labor Act until after the expiration of the Award?

2. Do the procedures established by Article III of the Award affect "rates of pay, rules, or working conditions"

within the meaning of those terms as used in Section 6 of the Railway Labor Act, so that such procedures continue to apply after the expiration of the Award until changed in accordance with Section 6 of the Railway Labor Act?

3. Where proceedings to change rules requiring a specified number of trainmen, brakemen or helpers were initiated under Section III of the Award prior to the expiration of the Award, may such proceedings be completed after expiration of the Award?

4. Does Section 8 of the Norris-LaGuardia Act (29 U.S.C. § 108) apply to a temporary restraining order issued to restrain a threatened strike allegedly in violation of the Railway Labor Act pending a hearing on a motion for preliminary injunction?

Statutes Involved

Public Law 88-108, Sections 5 First, 6, 7, 8 and 9 of the Railway Labor Act, and Sections 1, 4, 7, 8 and 9 of the Norris-LaGuardia Act are set forth in Appendix J hereto.

Statement of the Case

In 1959, the overmanning of trains resulting from obsolete work rules having little or no relation to actual manpower needs in the light of technological developments constituted a serious problem. See *Brotherhood of Locomotive Eng.* v. *Baltimore & Ohio R. Co.*, 310 F. 2d 503, 505-506 (7th Cir., 1962), aff'd, 372 U.S. 284 (1963); *Railroad Passenger Train Deficit*, 306 I.C.C. 417, 480 (1959). On or about November 2, 1959, in an effort to overcome this problem, most of the nation's railroads served the unions representing their operating employees with notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156). While a number of proposals were made, the two relevant here sought, in general, to eliminate all rules requiring the

use of firemen on diesel locomotives in freight and yard service and all rules which required the use of a stipulated number of trainmen (such as brakemen and helpers) in road and yard service, and to leave those matters to managerial discretion. On or about September 7, 1960, the unions served the railroads with Section 6 notices of counterproposals which, among other things, would generally require the use of a fireman on all locomotives and the use of two brakemen or helpers on all road and yard crews. JA 3-4, 14-17, 19-20.[2]

A Presidential Railroad Commission was appointed by the President on an *ad hoc* basis to investigate the dispute and use its best efforts to bring about a settlement (JA 5, 20). In its February 26, 1962 Report to the President, the Commission recommended generally (p. 7) that "the rules governing the manning of engines and trains and the assignment of employees be revised to permit the elimination of unnecessary jobs and at the same time to safeguard the interests of the individual employees adversely affected." Detailed recommendations in that regard were made (Report, at 35-50, 53-60) and were accepted by the carriers, but rejected by the unions. H. Rept. No. 713, 88th Cong., 1st Sess., 7. After the validity of the carriers' proposals was upheld in litigation brought by the unions, *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963), the President appointed an emergency board under Section 10 of the Railway Labor Act (45 U.S.C. § 160). The recommendations of the emergency board generally paralleled those of the Commission, and were accepted by the carriers but rejected by the unions. H. Rept. No. 713, *supra* at 7.

The report by the emergency board exhausted the proce-

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[2] "JA" references are to the Joint Appendix in No. 20152 below, unless otherwise indicated.

dures of the Railway Labor Act and, following the expiration of 30 days, the carriers were free to implement their proposals and the unions were free to strike or engage in other self help. *Locomotive Engineers* v. *B. & O. R. Co., supra* at 291. When it became apparent that a disastrous nationwide railroad strike was imminent, the President proposed preventive legislation and the Congress responded by enacting Public Law 88-108 (77 Stat. 132). Under that legislation, the two key issues concerning the rules governing the use of firemen and train crew consists were submitted to arbitration in accordance with the procedures established by Sections 7 and 8 of the Railway Labor Act (45 U.S.C. §§ 157, 158), and the arbitration award was to constitute a "complete and final disposition" of the portions of the Section 6 notices raising those issues (P.L. 88-108, §§ 3, 4). The validity of the Award by Arbitration Board No. 282 was upheld in *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11 (D. D.C., 1964), aff'd *per curiam*, 331 F. 2d 1020 (D.C. Cir., 1964).

With respect to the use of firemen, the Award, in general, modified the existing rules so as to permit the eventual elimination of all but 10% of the regular assignments on diesel locomotives in freight and yard service and to provide generous separation allowances and other protections for existing firemen. Pursuant to those provisions, the carriers reduced the numbers of firemen in their employ by some 18,000, paid separation allowances amounting to more than $36,000,000, and provided comparable jobs to some 1200 former firemen (JA 142-143).

With respect to the crew-consist issue, Board 282 found that the existing "myriad of local arrangements has led to numerous inconsistencies in the manning of crews," that "some of the existing rules, originating as they did

more than a half-century ago, are anachronistic and do not reflect the present state of railroad technology and operating conditions," that "some overmanning exists in road and yard crews as a result of schedule rules and local agreements," and that, although "the evidence of undermanning is less persuasive, we must also acknowledge this possibility on some assignments." *Opinion of Neutral Members,* 41 Labor Arbitration 680, 693-694 (1963). The Board found that the the parties had reached tentative agreements which would largely dispose of this issue (*id.*, at 695-696), and Article III of the Award, "[e]xcept for minor modifications, . . . reflects each one of these tentative agreements, both in matters of approach and in matters of substance" (*id.*, at 696).

Article III (App. I, at 104a-109a) established a procedure whereby, in general, written notice could be given of proposed changes in rules requiring a specified number of trainmen, the interested carrier and union conferred and attempted to reach agreement upon any changes to be made, and either party could submit the dispute to a special board of adjustment (consisting of one carrier member, one union member and a neutral member) for final decision pursuant to "guidelines" specified in the Award if no agreement was reached. No trainmen could be separated from employment pursuant to the Award, and trainmen in active service as of the effective date of the Award were to be retained in road or yard service until they retired, were discharged for cause or otherwise were removed from employment by natural attrition.

Section 4 of P.L. 88-108 provided that Award 282 "shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise." Article IV of the Award (App. I, at

110a) provided that the "Award shall continue in force for two years from the date it takes effect, unless the parties agree otherwise." January 25, 1966 was the last day of that two-year period insofar as the crew-consist provisions of the Award are concerned (JA 9, 22). Pursuant to those provisions, the railroads were authorized to discontinue some 7500 crew-consist positions when not needed to provide employment to protected employees, as a result of 92 agreements and 83 special board awards executed at various times between May of 1964 and January 25, 1966. When the Award expired on January 25, 1966, about half of those assignments had been eliminated and it was estimated that the remainder would be completely eliminated in from two to four years through attrition of the protected employees. Proceedings before four special boards of adjustment established under the Award were pending when the Award expired. JA 62-75, 142.

Prior to the expiration of the Award, the BRT served some 85 of the railroads, under Section 6 of the Railway Labor Act, with notices of a proposal to require the use of at least two brakemen or helpers on all crews in road and yard service effective January 26, 1966 (JA 78, 116-119).[3] In March of 1965, some 10 months prior to the expiration of the Award, the ORC&B served some 54 railroads, under Section 6 of the Railway Labor Act, with notices of a proposal to require two brakemen on train crews in road service (JA in No. 20,158, at 76-78). The carriers took the position that such notices were premature and refused to bargain about the merits of the unions' proposals prior to the expiration of the Award (JA in No.

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[3] Most of those carriers and several others served the Brotherhood with notices of a counterproposal, without waiving their position that such notices were premature when served under the Railway Labor Act prior to the expiration of the Award (JA 79, 107-112).

20,158, at 78-79; JA in No. 20,229, at 193-306).[4] In some instances, the unions sought to invoke the services of the National Mediation Board prior to the expiration of the Award (*ibid.*).

In addition to the dispute over the prematurity of the Section 6 notices served prior to the expiration of Award 282, the parties were in dispute concerning the effect of the expiration of the Award. In general, the carriers contended that the modifications in their agreements and rules made by or pursuant to the Award continued to apply after expiration of the Award until changed in accordance with the Railway Labor Act, while the unions contended that the agreements and rules in effect prior to the Award were restored upon expiration of the Award. On January 7, 1966, the Brotherhood of Railroad Trainmen made a formal demand upon many of the carriers that "immediately upon expiration of the Award of Arbitration Board 282 at 12:01 A.M., January 26, 1966, [they] proceed to take the necessary steps to arrange" for restoration of the prior rules and agreements (JA 10, 23).

Shortly thereafter, petitioners filed their complaint for a declaratory judgment and injunctive relief against the respondent unions.[5] The jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331, 1337, 2201 and 2202. A temporary restraining order against strikes by the union

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[4] The ORC&B did not represent road brakemen on 44 of the carriers, and those carriers also took the position that the notices were invalid and non-bargainable for that reason (JA in No. 20,158, at 78, 83-86). The parties stipulated that the issue would not be litigated in this proceeding, but could be raised in another proceeding, and the issue was not considered by the courts below (JA 81, 173-174).

[5] The firemen's provisions of the Award did not expire until March 31, 1966. Consequently, the issues raised by the expiration of those provisions were the subject of a separate proceeding in the District Court, although the appeals therefrom were heard and decided by the Court of Appeals together with the appeals involved here. See fn. 1, p. 2, *supra*.

pending hearing on a motion for a preliminary injunction was entered and, with the consent of the parties, extended for some time (JA 35-40). However, the parties eventually agreed to submit the case for final decision upon the basis of a stipulated record, and the carriers did not further press their prayer for injunctive relief. Accordingly, the District Court issued a declaratory judgment setting forth its rulings upon the legal issues involved (JA 175-181; JA in No. 20,158, at 167-174; JA in No. 20,229, at 317-319). In general, that Court held: (1) that the modifications in the crew-consist rules made by agreements or by special board awards pursuant to the procedures established by Award 282 continued to apply after expiration of the Award until changed in accordance with the Railway Labor Act, as did the protections afforded by the Award to crew-consist employees; (2) that the procedures established by the Award for changing crew-consist rules terminated upon expiration of the Award and could neither be initiated nor completed thereafter; and (3) that the Section 6 notices served prior to the expiration of the Award were premature and did not become effective under the Railway Labor Act until the day after the Award expired.

All parties appealed. The Court of Appeals affirmed the first two rulings and affirmed the third insofar as the Section 6 notices served by the ORC&B were concerned, but reversed the third ruling insofar as the Section 6 notices served by the BRT were concerned. The Court of Appeals also held that the temporary restraining order was invalid insofar as it applied to the BRT (but not insofar as it applied to the other unions) by reason of Section 8 of the Norris-LaGuardia Act (29 U.S.C. § 108). A number of other issues, which are neither raised in this petition nor necessary to an understanding of the issues raised here, also were ruled upon by the lower courts.

Reasons for Granting the Writ

In P.L. 88-108, the Congress provided for arbitration of the crew-consist and firemen issues raised by the 1959 and 1960 Section 6 notices in accordance with the provisions of the Railway Labor Act. One must look to the Railway Labor Act, therefore, to determine the conseqnences of the expiration of the two-year period in which the arbitration award remained in effect. While this generally was recognized by the court below and it correctly held that the changes in substantive crew-consist rules effected by agreement or by special-board awards pursuant to Award 282 continued to apply after expiration of the two-year period by virtue of the Railway Labor Act until changed in accordance with that Act, the court below erred in failing to recognize that certain other consequences flowed from the adoption by the Congress of the arbitration provisions of the Railway Labor Act to settle the dispute. In particular, the court erred in failing to recognize that the procedures for changing substantive crew-consist rules established by Award 282 also continued after expiration of the two-year period by virtue of the Railway Labor Act until changed in accordance with that Act and in failing to recognize that the effect of the two-year period was to establish a moratorium during which the parties could not be required to bargain under the Railway Labor Act about crew-consist proposals.[6] In addition, the court erred in holding that Section 8 of the Norris-LaGuardia Act applied to the temporary restraining order against the BRT entered by the District Court. The issues thus raised are important to the administration of the Railway Labor Act and the

[6] Similar erroneous rulings were made by the Court below with respect to the firemen's aspect of the Award. While not directly involved in this case, they are involved in another proceeding and it is expected that they will be brought before this Court by petition for writ of certiorari in that proceeding. See fn. 1, at p. 2, *supra*.

Norris-LaGuardia Act and conflict in principle with decisions by this Court and by other courts of appeals. Consequently, we believe that the rulings below with respect to those issues deserve review by this Court.

A. *This Court Should Review the Holding that the Procedures Established by the Award for Changing Crew-Consist Rules Could Neither Be Initiated Nor Completed after Expiration of the Award and the Holding that Petitioners Could Be Required to Bargain under the Railway Labor Act during the Period of the Award upon Proposed Changes in Crew-Consist Rules.*

As we briefly demonstrate below, the Congress integrated its disposition of the crew-consist and firemen disputes arising out of the 1959 and 1960 Section 6 notices into the normal processes of the Railway Labor Act by providing for arbitration of those issues in accordance with the arbitration provisions of the Railway Labor Act. Hence, a determination of the effects of the expiration of the two-year period of the Award by Arbitration Board No. 282 basically involves an interpretation of the Railway Labor Act. While this was recognized by the court below and some of its rulings correctly applied the provisions of the Railway Labor Act to some aspects of the situation existing upon expiration of Award 282, other rulings by that court incorrectly interpreted and applied the provisions of the Railway Labor Act to other aspects of that situation.

1. *The Congress adopted the provisions of the Railway Labor Act.* When a nationwide railroad strike was threatened following exhaustion of the procedures of the Railway Labor Act with respect to the Section 6 notices served in 1959 a 1960 (see pp. 4-6, *supra*), the President urged that the Congress act to prevent such a disaster and his Administration submitted a bill (H.J. Res. 565 and S.J. Res.

102, 88th Cong., 1st Sess.) for that purpose. The Administration's bill provided for regulation by the Interstate Commerce Commission of all the issues raised by the 1959 and 1960 Section 6 notices, through interim rules that would "remain operative until the parties reach agreement regarding the matter involved, or if no agreement is reached, for two years following the date the interim rules goes into effect." The bill did not provide for disposition of the Section 6 notices. Rather, it provided for "continued collective bargaining" upon those notices and that, if no agreement was reached prior to expiration of the I.C.C. rules, the President should report to the Congress "and make such further recommendations, if any, as he deems appropriate, including his recommendation as to whether this joint resolution should be extended."[7]

Under the Administration's bill, therefore, the parties would have been required to continue bargaining upon the 1959 and 1960 Section 6 notices during the period of I.C.C. regulation; if no agreement disposing of the dispute was reached in that bargaining, the Section 6 notices would remain outstanding and the parties once again would be free to engage in self help upon expiration of the I.C.C. regulations unless additional legislation was enacted. This was confirmed by testimony in the committee hearings (which were exclusively devoted to the Administration's bill) by the Secretary of Labor and others. The Secretary acknowledged, however, that a nationwide railroad strike would be as intolerable at the later time when the I.C.C. regulations expired as it was then and believed that the

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[7] The Administration's bill is set forth in the Hearings on H.J. Res. 565 before the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess. (hereinafter referred to as "House Hearings") at 1-3, and in the Hearings on S.J. Res. 102 before the Senate Committee on Commerce, 88th Cong., 1st Sess. (hereinafter refered to as "Senate Hearings"), at 1-3.

President would recommend an extension of the legislation when he reported to the Congress as required by the Administration's bill, if the parties did not dispose of the dispute by agreement. See, *e.g.*, House Hearings, at 55-56, 59-60, 64-65, 69, 81, 107, 109, 114, 565; Senate Hearings, at 49-51, 54-56, 61, 63, 81, 364, 370-371, 375.

The congressional committees, however, were not satisfied with the Administration's bill. They did not share the Administration's optimism that an agreement disposing of the dispute would be reached during the period of I.C.C. regulation, and they believed (S. Rept. No. 459, 88th Cong., 1st Sess., at 10) that:

> "A failure to provide for a complete solution which would terminate the dispute at this time might well result in the necessity for a resumption of Congressional activity in a few months time. The committee has sought to avoid this possibility, both because of its distaste for legislating solutions to labor-management disputes and because of the obvious dangers of repeated congressional intervention in this field."

Accordingly, the committees revised the bill so as to "adopt the time-tested provisions of the Railway Labor Act" (*id.*, at 3) in disposing of the key issues in dispute, and it was the bill as thus revised which was enacted by the Congress.

Thus, P.L. 88-108 did not provide for I.C.C. regulation, but (§ 4) for arbitration of the crews-consist and firemen issues which "shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act" to the extent possible, with the arbitration award being "made and filed as provided in said sectons and . . . subject to section 9 of said Act." Under Sections 7 and 8 of the Railway Labor Act, the parties by agreement may submit labor disputes to binding arbitration. 45 U.S.C. §§ 157, 158. In the preamble

to P.L. 88-108, the Congress noted that the parties had agreed in principle to arbitration of the disputes arising out of the 1959 and 1960 Section 6 notices, but had been "unable to agree upon the terms and procedures of an arbitration agreement." In effect, therefore, the Congress wrote an arbitration agreement for the parties. See *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11, 18 (D. D.C., 1964), aff'd *per curiam*, 331 F. 2d 1020 (D.C. Cir., 1964). In addition, P.L. 88-108 omitted the requirement in the Administration's bill for continued collective bargaining upon the crew-consist and firemen aspects of the 1959 and 1960 Section 6 notices,[8] and provided instead (§ 3) that the award by the arbitration board would constitute a "complete and final dispositon" of those aspects of the Section 6 notices.[9]

By thus adopting the "time-tested provisions of the Railway Labor Act," the Congress must have intended that the situation following the expiration of the two-year period of Award 282 should be the same as that which follows the expiration of a collective bargaining agreement or arbitration award arrived at under the Railway Labor Act. As the floor manager (Representative Harris) of the legislation explained in the House debates: "The resolution provides that on the two major issues, the order of the arbitration board would be in force for a period of 2 years. Then the issues go back under the regular es-

[8] Section 6 of P.L. 88-108 provided for a resumption of collective bargaining upon the other aspects of the Section 6 notices, and they were disposed of by an agreement entered into on June 25, 1964 (JA 8, 22).

[9] In thus disposing of the Section 6 notices, the Congress avoided the situation which would have existed under the Administration's bill following the expiration of the I.C.C. regulations whereby those notices would have remained outstanding (unless disposed of by agreement) so as to permit the parties to engage in self help with respect thereto. Hence, no one contends that upon expiration of Award 282 the carriers could implement their 1959 Section 6 notices or that the unions could strike to coerce acceptance of the proposals in their 1960 Section 6 notices.

tablished procedures of collective bargaining." 109 Cong. Rec. 16128; see, also, *id.*, at 16130. Of course, the "regular established procedures of collective bargaining" in the railroad industry is provided by the Railway Labor Act. This principle was recognized by the court below, which stated, among other things, that (App. E, at 50a): "In essence then we have a mechanism tantamount to an arbitration agreement, albeit one drafted by Congress, that confers on the arbitrator the power to impose a settlement binding for up to two years. It becomes appropriate, then, to consider what would have been the rights and duties of the parties if they had themselves written the arbitration agreement."

2. *Under the Railway Labor Act, the rights and duties of the parties to a collective bargaining agreement or arbitration award continue after its termination date until changed in accordance with the Act.* While the Railway Labor Act does not require agreement upon proposed changes in rates of pay, rules or working conditions, it provides procedures that "are purposefully long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238, 246 (1966). The Act thereby provides "a framework for peaceful settlement of labor disputes between carriers and their employees to 'insure to the public continuity and efficiency of interstate transportation service, and to protect the public from the injuries and losses consequent upon any impairment or interruption of interstate commerce through failures of managers and employees to settle peaceably their controversies.' H.R. Rep. No. 328, 69th Cong., 1st Sess., p. 1." *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, 609 (1959).

The keystone of the procedures thus established is the

requirement in Section 6 that a carrier or union "shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions. . . ." It is the service of such a notice which calls into play the further requirements for conferences, mediation by the National Mediation Board, a proffer of voluntary arbitration, and, in the President's discretion, an investigation by an emergency board. 45 U.S.C. §§ 155-160. The disputes thus created are settled either by a new collective bargaining agreement or by an agreement to submit the dispute to binding arbitration under Sections 7 and 8 of the Act. If either party subsequently desires to change the new agreement or the arbitration award pursuant to the arbitration agreement, the procedures required by the Act must be reinstituted through the service of another Section 6 notice.

Obviously, the parties should not be permitted to short circuit this statutory procedure and put themselves into a position to strike or engage in other self help without exhausting that procedure, merely by providing in a collective bargaining agreement or arbitration award that it shall terminate on a specified date. Cf., *Felter* v. *Southern Pacific Co.*, 359 U.S. 326, 336 (1959). Rather, as was held in *Manning* v. *American Airlines, Inc.*, 329 F. 2d 32, 34 (2d Cir., 1964), the "effect of § 6 is to prolong agreements subject to its provisions regardless of what they say as to termination," until they are changed pursuant to new Section 6 notices and the other procedures required by the Act. See, also, *United Indus. Wkrs. of Seafarers, Etc.* v. *Board of Trustees*, 351 F. 2d 183, 190, fn. 26 (5th Cir., 1965).

This basic principle was recognized by the court below. In its initial opinion, that court rejected the unions' contention that the rules and agreements in effect prior to

Award 282 automatically were restored upon expiration of the Award, because (App. E, at 45a-46a):

> "We think the mere limitation of the effective period of the Award neither implies nor compels the construction the unions seek. Our ruling is that the work rules created by the Award constituted a new plateau that was not automatically eroded when the Award expired. The legal underpinning for our ruling is not the Joint Resolution, which expired after 180 days of life—except insofar as necessary to sanction the Award. The ruling is not based on the Award, which had only a 2-year life, or on any agreement of the parties. The predicate of our ruling is, simply, the force of the Railway Labor Act. Certain work rules were in force on [the day the Award expired]. The mandate of the Railway Labor Act requires that the work rules in effect on any particular day shall also be in effect the following day—beyond the power of either party to institute a unilateral modification—subject to change only in accordance with the procedures prescribed by the Act. These procedures begin with the notices required by Section 6 to be served by any party seeking a change at least thirty days in advance of the proposed effective date of such change. This new-plateau reasoning applies even though the work rules are established by agreements of limited duration. 'The effect of § 6 is to prolong agreements subject to its provisions regardless of what they say as to termination.' [Citing *Manning* v. *American Airlines, Inc.*, 329 F. 2d 32, 34 (2d Cir., 1964).] It likewise applies even though the work rules are established by an arbitration award of limited duration."

This ruling was clearly correct insofar as it held that the rules established by or pursuant to Award 282

continued to apply after expiration of the Award, by "force of the Railway Labor Act," until changed in accordance with that Act. But the court's use of the term "work rules" gave some reason to believe that the court had a mistaken impression of the scope of Section 6 which applies not just to changes in "rules," but to changes in "agreements affecting . . . rules. . . ." This was confirmed by the court's supplemental opinion, which held (App. F, at 76a-77a) that the procedures for changing crew-consist rules established by Award 282 could neither be initiated nor completed after expiration of the Award. Thus, according to the court below, the crew-consist agreements and special board awards made pursuant to those procedures during the period of the Award and the provisions in the Award for the protection of the employees continue until changed in accordance with the Railway Labor Act, but the procedures themselves do not.

We submit that, in so ruling, the court below seriously misconstrued the scope of Section 6. As we have noted, Section 6 applies to "intended changes in agreements *affecting* rates of pay, rules, or working conditions" (emphasis added), and not merely to intended changes *in* rates of pay, rules, or working conditions. We think it obvious that an agreement or arbitration award establishing a procedure for changing crew-consist rules or other substantive "work rules" is one "affecting . . . . rules." If the parties to the dispute arising out of the 1959 and 1960 Section 6 notices had resolved that dispute by an agreement establishing a procedure comparable to that provided in Award 282, as they almost did, or if they had agreed to submit the dispute to arbitration, as they almost did, and the resulting arbitration award established such a procedure, there could hardly be any doubt about the fact that those procedures would continue to apply, by "force of the Railway Labor Act," after the termination

date of the agreement or arbitration award until changed in accordance with that Act. And, as we have shown, the Congress intentionally adopted the arbitration provisions of the Railway Labor Act and in effect wrote an arbitration agreement for the parties, so that Award 282 is the equivalent of an award pursuant to an agreement to arbitrate.[10]

We do not know of any other decision that has limited Section 6 to changes in substantive "work rules" (or substantive "rates of pay" and "working conditions") or even suggested that Section 6 should be so limited. Indeed, the *Manning* case which was relied upon by the court below did not involve a substantive "work rule," rate of pay or working condition, but a provision in an agreement establishing a procedure for the check-off of union dues, and the Second Circuit in that case held that the "effect of § 6 is to prolong *agreements* subject to its provisions regardless of what they say as to termination" (emphasis added). Conversely, where an agreement or arbitration award provides a procedure for changing existing rules, rates of pay or working conditions, such changes may be made pursuant to that procedure without resort to Section 6 and the other procedures established by the Act. Thus, in *Westchester Lodge 2186, Etc.* v. *Railway Express*

[10] In its supplemental opinion, the court below purported to rest its decision that the procedures established by the Award did not continue upon "an accommodation of the sometimes divergent directives of Public Law 88-108, Award 282, and the Railway Labor Act" (App. F, at 76a). The Court did not point to any "directives" in P.L. 88-108 or the Award which diverge from the "directives" of the Railway Labor Act, however, and we believe that we have demonstrated that the Congress in P.L. 88-108 adopted "the time-tested provisions of the Railway Labor Act" rather than diverging from that Act. Insofar as we are aware, there is nothing in P.L. 88-108, in its legislative history or in Award 282 which differentiates in any way between the provisions of the Award establishing procedures for changing crew-consist rules, the provisions of the Award establishing protections for the employees and the agreements and special board awards pursuant to the Award, insofar as this issue as to the situation following the expiration of the Award is concerned.

Agency, Inc., 329 F. 2d 748 (2d Cir., 1964), the court rejected a contention that the *status quo* provisions of Section 6 applied to a dispute over the transfer of certain employees from one seniority district to another. This was so because the collective bargaining agreement established a procedure whereby such transfers could be brought about through "conference and agreement between the management and the duly accredited representatives of the employees," and the carrier contended that the transfers had been authorized pursuant to that procedure. As the court pointed out, "an agreement made pursuant to a specific contract provision designed to cover the situation cannot fairly be termed an alteration of the collective agreement" so as to be subject to Section 6. *Id.*, at 752. And see, *e.g.*, *St. Louis S.F. & T. Ry. Co.* v. *Railroad Yardmasters of America*, 328 F. 2d 749, 752-753 (5th Cir., 1964).

Issues as to the scope of Section 6 perhaps most often arise in the context of a contention that a proposal in a Section 6 notice is not mandatorily bargainable because it does not affect rates of pay, rules or working conditions within the meaning of that Section. Such an issue was dealt with by the court below, in an aspect of its initial opinion which dealt with the consolidated case involving the firemen's provisions of the Award. The court there noted that the "scope of bargainability" under Section 6 "is extremely broad." App. E, at 61a. The opinion of this Court in *Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330 (1960), was relied upon for that proposition. In the *Telegraphers* case, this Court upheld the bargainability of a Section 6 notice proposing that no position in existence on a specified date "will be abolished or discontinued except by agreement between the carriers and the organization" (*id.*, at 332)—thus proposing to establish a "procedure" for negotiating outside the processes of the Railway Labor

Act concerning the abolition of such positions.[11] See also, *Railway Clerks* v. *Florida E.C.R. Co., supra* at 243, where this Court held that a Section 6 notice of a proposal to require six-months advance notice of layoffs and job eliminations created a major dispute under Section 6 of the Railway Labor Act and thus, in effect, that such a proposal is bargainable.

In short, under Section 6 of the Railway Labor Act as under the Labor-Management Relations Act, "[w]hether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table. . . ." *Labor Board* v. *American Ins. Co.*, 343 U.S. 395, 409 (1952). This Court expressly upheld the validity and bargainability of the carriers' 1959 Section 6 notices, including the proposal that management be given absolute discretion to determine crew consists. *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963). We think it inconceivable that the Court would have held those notices to be non-bargainable under Section 6 if they had provided for arbitration of proposed changes in crew consist not agreed to by the union, thus affording additional protections to the union in the manner afforded by Award 282. Yet, the logic of the ruling below that the procedures established by the Award are not continued by force of Section 6 until changed in accordance with the Railway Labor Act would demand a ruling that

[11] Of course, the fact that the procedure established by Award 282 provided for arbitration if the parties could not agree after negotiations is not material for present purposes. "The Railway Labor Act fosters no overriding policy or purpose which would deny enforcement of an agreement to arbitrate." *Brotherhood of Loc. Eng.* v. *Chicago & North Western Ry. Co.*, 314 F.2d 424, 433 (8th Cir., 1963). If anything, the provision for arbitration makes even more clear that the procedural provisions of the Award are provisions "affecting . . . rules" so as to come within the requirement of Section 6 that they cannot be changed except in accordance with the Railway Labor Act.

a Section 6 notice proposing to establish such procedures is not mandatorily bargainable.

We submit, however, that the ruling that the procedures established by the Award may neither be invoked nor completed after expiration of the Award is erroneous and conflicts in principle with decisions by this and other courts construing the scope of Section 6. The issue thus presented is important, both in terms of this case and in terms of the proper administration of the Railway Labor Act, and, we believe, should be reviewed by this Court.

3. *Under the Railway Labor Act, the purpose and effect of a termination date in a collective bargaining agreement or arbitration award is to preclude the parties from being required under the Act to bargain prior to such termination date about proposed changes in the agreement or award.* As we have shown, the expiration of a collective bargaining agreement or arbitration award under the Railway Labor Act does not terminate the rights and duties of the parties pursuant to such agreement or award. Thus, the purpose and effect of including a termination date in such an agreement or award is not to terminate the rights and duties of the parties thereunder. Rather, the purpose and effect of including a termination date is to establish a moratorium period in which the parties to the agreement or award cannot be compelled to bargain under the Railway Labor Act concerning proposed changes in the agreement or award. Such bargaining can be compelled only after the termination date.

In *Flight Engineers' Inter. Ass'n.* v. *American Airlines, Inc.*, 303 F. 2d 5 (5th Cir., 1962), appeal dismissed by stipulation, 314 F.2d 500 (5th Cir. 1963), for example, the carrier and union had entered into an agreement which was to terminate five years from its affective date. On the same day, they entered into a supplemental agreement which provided that "written notice of an intended change

in any provision could be served 30 days after the first anniversary of the first turbine aircraft in scheduled passenger service." *Id.*, at 7. The union served a Section 6 notice after the date specified in the supplemental agreement, but "the Carrier took the position that a number of [the union's] demands were actually covered by the terms of the basic agreement, and therefore not open for bargaining for 5 years." *Id.*, at 7.

The trial court enjoined a strike by the union pending a determination by an adjustment board, under Section 3 of the Railway Labor Act (45 U.S.C. § 153), of whether or not the union's demands were outside the scope of the reopening clause in the supplemental agreement, and the Fifth Circuit affirmed. In so doing, the Fifth Circuit rejected a contention that the carrier could be compelled to bargain prior to the expiration of the basic agreement even if the section 6 proposals related to matters covered by that agreement rather than by the supplemental agreement, stating (*id.*, at 13) that:

> "Again, without anticipating what the decision of the System Board of Adjustment on the merits (assuming it has jurisdiction) must be, this analysis rests on the premise that the law as such will give vitality to the duration clauses and correlative reopening clauses of labor contracts. The Union argues in effect that since no one in 1958 knew all the problems which would arise in the operation of jets, the Union could not foreclose its statutory right—and duty—to bargain when, and as, and as often as needed. But any such rule leads either to chaos or a demolition of the concept of industrial peace through labor contracts fairly arrived at."

So, too, in *Capitol Airways, Inc.*, v. *Air Line Pilots Ass'n*, 41 CCH Labor Cases ¶ 16,739 (MD. Tenn., 1961), the car-

rier and union executed an agreement containing a provision that it was to expire on June 30, 1961. The plaintiff contended that this was a "valid contract" and hence that it had "no duty to bargain with the defendant" union in regard to the employees covered by the contract "until the contract expires on June 30, 1961." The court stated that if the agreement was valid it follows "necessarily that the plaintiff is not required to bargain [with the union as representative of those employees] with respect to their terms and conditions of employment until the expiration of such agreement on June 30, 1961;" held that the agreement was valid, and granted a summary judgment for the plaintiff. See, also, *Rutland Ry.* v. *Brotherhood of Loc. Eng.*, 307 F.2d 21, 36 (2d Cir., 1962), where the court stated that: "We do not say that the issue in the present case is not a bargainable one. We have no doubt that the brotherhoods, upon the expiration of the existing agreements, may require the railroad to bargain. . . ."

Insofar as we are aware, there were no decisions to the contrary prior to the decision by the court below. While that court correctly held that the carriers were not required to bargain prior to the expiration of the Award upon the Section 6 notices served by the ORC&B, it erroneously held that the carriers were required to bargain prior to the expiration of the Award upon the Section 6 notices served by the BRT. App. E, at 47a-58a. The distinction drawn by the court below was that the ORC&B notices proposed changes in crew-consist rules to become effective during the period of the Award, while the BRT notices proposed changes in crew-consist rules to become effective the day after the expiration of the Award. Although the attempt by the ORC&B to ignore the Award altogether undoubtedly emphasizes the impropriety of its endeavor to proceed under the Railway Labor Act during the period

of the Award, we submit that the mere fact that the BRT specified an effective date immediately following the expiration of the Award did not entitle it to require the carriers to bargain over its Section 6 notices prior to the expiration of the Award.

In holding to the contrary, the court below relied heavily (App. E, at 48a-49a) upon testimony during the hearings upon the Administration's bill to the fact that bargaining upon the 1959 and 1960 Section 6 notices would continue during the period of I.C.C. regulation as required by that bill. But, as we have shown (pp. 12-16, *supra*), the Administration's bill was revised to eliminate the requirement for such bargaining and the Congress, instead, provided in P.L. 88-108 for a "complete and final disposition" of the 1959 and 1960 notices through arbitration in accordance with the Railway Labor Act. And, as we have further demonstrated (pp. 23-25, *supra*), the purpose and effect of a termination date in an agreement or arbitration award under the Railway Labor Act is to assure that one party cannot reopen the dispute so as to compel further bargaining under the Railway Labor Act prior to that termination date. "*Then* the issues go back under the regular established procedures of collective bargaining" (emphasis added), as the House was informed by Representative Harris (see pp. 16-17, *supra*).

But for this aspect of the "time-tested provisions of the Railway Labor Act" which the Congress adopted in P.L. 88-108, the Congress could not have been assured of avoiding the possibility, which it found to be an objectionable feature of the Administration's bill (see p. 14, *supra*), of being faced with a renewed threat of a railroad strike and a consequent demand for further legislative intervention, within a relatively short time. Otherwise, the unions could have placed themselves in a position to strike

immediately upon expiration of the Award by exhausting the procedures of the Railway Labor Act during the period of the Award with respect to Section 6 proposals such as those served by the BRT. Plainly, this was not intended by the Congress.

A. *This Court Should Review the Holding that Section 8 of the Norris-LaGuardia Act Invalidated A Temporary Restraining Order Entered by the District Court.*

The trial court temporarily restrained the respondent unions from striking over their demand that the rules and agreements in effect prior to the Award be restored upon expiration of the Award, pending a hearing upon a motion for a preliminary injunction. The court below held that this action was erroneous, insofar as the BRT was concerned, since the carriers had not complied with Section 8 of the Norris-LaGuardia Act (29 U.S.C. § 108), which provides that:

> "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

In view of the court's holding that the carriers were required during the period of the Award to bargain upon the Section 6 notices served by the BRT, by refusing to do so they "failed to comply with any obligation imposed by law which is involved in the labor dispute in question" according to the court below. Consequently, if that court

erred in holding that the carriers had a duty to bargain upon the BRT notices during the period of the Award, it also erred in holding that the temporary restraining order was invalid insofar as it applied to the BRT. But there is a far more fundamental reason why the latter holding is in error: neither Section 8 nor any other provision of Norris-LaGuardia applies to a restraining order or other injunctive relief designed to compel compliance with a mandate of the Railway Labor Act.

Section 4 of the Norris-LaGuardia Act deprives the federal courts of jurisdiction to enjoin certain specified activities in connection with labor disputes subject to the Act, including "[c]easing or refusing to perform any work or to remain in any relation of employment;" *i.e.*, strikes, 29 U.S.C. § 104. Sections 7, 8 and 9 establish procedural requirements applicable to requests for injunctive relief in labor disputes subject to the Act with respect to activities as to which all jurisdiction to issue such relief has not been withdrawn by Section 4. In addition to the requirements of Section 8 quoted above, Section 7 requires findings of fact as to a number of specified matters based upon testimony in open court (29 U.S.C. § 107), and Section 9 limits the scope of any injunctive relief to the specific acts found to be illegal (29 U.S.C. § 109).

The court below was "clear that the District Court was correct in holding that it had jurisdiction to enjoin a violation of the Railway Labor Act, and that this jurisdiction was not negatived by or subject to Section 4 of the Norris-LaGuardia Act" (App. F, at 86a). But, the court below also held that this Court, in *Trainmen* v. *Chicago, R. & I.R. Co.*, 353 U.S. 30 (1957) (the *Chicago River* case), has established a "principle of accommodation" between the two statutes which "means that actions to enjoin violations of the Railway Labor Act may be maintained without regard

to Section 4 of the Norris-LaGuardia Act, and yet be subject to Section 8 of that Act" (App. F, at 87a). We believe that this latter holding represents a misunderstanding of the *Chicago River* opinion, and is contrary to the holding in that and numerous other cases.[12]

It is quite true that this Court in its *Chicago River* opinion stated that there "must be an accommodation" of the Norris-LaGuardia and Railway Labor Acts (353 U.S., at 40), but the "accommodation" to which this Court referred did not involve picking and choosing among the various provisions of Norris-LaGuardia. Indeed, this Court in that opinion did not single out for mention any particular provision of Norris-LaGuardia, much less analyze the various provisions in some attempt to determine which must apply and which should be disregarded so as to "accommodate" that Act with the Railway Labor Act. The accommodation which this Court made, upon the basis

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[12] Of the cases cited by the court below (App. F. at 87a, fn. 4) for the proposition that other courts have reached the same conclusion regarding the applicability of Section 8, only the *Rutland Ry.* case actually did so. The *Chicago, Rock I. & Pac. R.R.* case held Section 4 of Norris-LaGuardia to be applicable because the plaintiff had not shown a violation of the Railway Labor Act by the defendant, as did the *Elgin, J. & E. Ry.* case. The *Manning* case found that the plaintiff had complied with Section 8, without determining whether that was necessary. In the *Toledo, P. & W. R.R.* case, the procedures of the Railway Labor Act had been exhausted with respect to a major dispute so that the strike did not violate the Railway Labor Act. Rather, the plaintiff sought to enjoin violence pursuant to the Norris-LaGuardia Act itself and Section 8 concededly applied to any such injunction. The only issue was whether Section 8 had been complied with. The footnote in the *Florida E.C. Ry.* case was addressed to a similar assumed situation. The *Chicago & Nw. Ry.* case is contrary to the decision below. In that case, the Eighth Circuit pointed out (354 F.2d, at 794, fn. 8) that "even if the Norris-LaGuardia Act were held to apply in this case, it is arguable that at least the requirements of §8 of that Act had been met by the carrier," but held that in any event "the more specific and later-enacted Railway Labor Act must prevail to allow the issuance of the injunction" (354 F.2d, at 796) even if the carrier did not comply with the procedural requirements of Sections 7, 8 or 9 of Norris-LaGuardia.

of the legislative history of Norris-LaGuardia [13] and its prior decisions,[14] was that "the specific provisions of the Railway Labor Act take precedence over the more general provisions of the Norris-LaGuardia Act," so that "the District Court has jurisdiction and power to issue necessary injunctive orders [to enforce compliance with the requirements of the Railway Labor Act] notwithstanding the provisions of the Norris-LaGuardia Act." 353 U.S., at 42 (bracketed insert in the original).

In short, none of the provisions of Norris-LaGuardia apply to an injunction requiring compliance with the mandates of the Railway Labor Act. On the other hand, if no violation of the Railway Labor Act is involved, the fact that the labor dispute involves a carrier subject to that Act does not prevent Norris-LaGuardia from applying.[15]

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[13] See, *e.g.*, the following colloquy in the House debates over Norris-LaGuardia:

> "Mr. Lankford of Virginia. • • • Will the gentlemen answer this question? Does this make it possible for lack of an injuction to tie up railroads and prevent them from transporting milk, for example?
>
> "Mr. LaGuardia. I think the gentleman was a member of the House in 1926?
>
> "Mr. Lankford. No.
>
> "Mr. LaGuardia. We then passed the railroad labor act, and that takes care of the whole labor situation pertaining to railroads. They could not possibly come under this for reason that we provided the machinery there for settling labor disputes." 75 Cong. Rec. 5499.

[14] *Railroad Trainmen* v. *Howard*, 343 U.S. 768, 774 (1952); *Graham* v. *Brotherhood of Firemen*, 338 U.S. 232, 237-240 (1949); *Tunstall* v. *Brotherhood*, 323 U.S. 210 (1944); *Steele* v. *L. & N. R. Co.*, 323 U.S. 192 (1944); *Virginian Ry.* v. *Federation*, 300 U.S. 515, 563 (1937). See, also, *Locomotive Engrs.* v. *L. & N. R. Co.*, 373 U.S. 33, 42 (1963); *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 458 (1957). In *United States* v. *Mine Workers*, 330 U.S. 258, 290 (1947), this Court held that, where the applicability of Norris-LaGuardia is in issue, a "District Court unquestionably [has] the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction."

[15] For example, Norris-LaGuardia applies when the procedures of the Railway Labor Act have been exhausted in a major dispute, so that the

While most of the cases (as *Chicago River*) simply hold Norris-LaGuardia to be inapplicable to injunctions requiring compliance with the mandates of the Railway Labor Act, without referring to any particular provisions of Norris-LaGuardia,[16] this Court's earliest decision in this area expressly rejected a contention that Section 9 of Norris-LaGuardia applies in such circumstances. *Virginian Ry.* v. *Federation, supra* at 562-563. The applicability of Section 7 also has been rejected. *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Loc. Eng.*, 266 F. 2d 335, 339-340 (5th Cir., 1959), rev'd on other grounds, 363 U.S. 528 (1960); cf., *Textile Workers* v. *Lincoln Mills, supra* at 457-459, in which this Court expressly rejected the applicability of Section 7 to an injunction requiring compliance with the mandates of the Labor-Management Relations Act.

Finally, in square conflict with the court below, the Tenth Circuit has specifically held Section 8 of Norris-LaGuardia to be inapplicable to injunctions requiring compliance with the mandates of the Railway Labor Act. *Brotherhood of Railroad Train.* v. *Denver & R. G. W. R. Co.*, 290 F. 2d 266, 270 (10th Cir., 1961), as follows:

> "It is urged that the injunction entered in this case is prohibited by Section 8 of the Norris-LaGuardia Act. . . . We think this question was answered in the case of Brotherhood of Railroad Trainmen v. Chicago River & I.R.R., [353 U.S. 30], in which it was held that the general terms of the Norris-LaGuardia Act could

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parties are free to strike or resort to other self help without violating that Act. See *Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330 (1960); *Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U.S. 50 (1944); fn. 24 to this Court's opinion in the *Chicago River* case, 353 U.S., at 42.

[16] This Court so held in *Graham* v. *Brotherhood of Firemen, supra*, even though counsel for the union urged that Sections 7 and 8 of Norris-LaGuardia were applicable and had not been complied with, even if Section 4 were inapplicable. Brief for Respondent, at 16-17.

not be read alone in matters dealing with railway labor disputes, and that it did not prevent injunctions to prohibit strikes growing out of minor disputes which were specifically dealt with in the Railway Labor Act."

Accord, *Brotherhood of Railroad Carmen* v. *Chicago & N.W. Ry. Co.*, 354 F. 2d 786, 789-796 (8th Cir., 1965), which is discussed in fn. 12, p. 29, *supra*.

The decision below on this issue has little immediate importance to the parties. The temporary restraining order expired long ago by its own terms, and the carriers did not press their demand for further injunctive relief in view of the manner in which the case developed in the trial court. See pp. 9-10, *supra*. Thus, we urged to the court below that the issue was moot,[17] but that court thought that the BRT might possibly be able to prove some damages caused by the restraining order which would be recoverable upon the $10,000 bond posted pursuant to that order. App. F, at 86a-87a. But the principles declared by the court below are of considerable general importance in the administration of the Norris-LaGuardia and Railway Labor Acts, and, as we have shown, conflict with principles declared by this Court and other courts of appeals. In these circumstances, review of the issue by this Court appears to us to be fully justified.

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[17] See *Benitez* v. *Anciani*, 127 F.2d 121, 125 (1st Cir., 1942); *Southard & Co.* v. *Salinger*, 117 F.2d 194, 196 (7th Cir., 1941).

Conclusion

For the reasons stated above, this petition for writ of certiorari should be granted.

Respectfully submitted,

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005
Of Counsel for Petitioners.

FRANCIS M. SHEA
RICHARD T. CONWAY
734 Fifteenth Street, N.W.
Washington, D.C. 20005

JAMES R. WOLFE
Union Station Building
Chicago, Illinois 60606
Attorneys for Petitioners.

(2996-7)

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	2
The Writ Should Not Be Granted	3
I. Procedures established by the Award of Arbitration Board No. 282 for modifying rules governing the consist of train crews during the period of the Award do not remain available, after the expiration of the Award, for further modification of such rules	4
II. Notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156), served during the period of the Award of Arbitration Board No. 282, proposing changes in crew-consist rules to become effective after the expiration of the Award, were effective to require negotiations prior to the expiration of the Award	12
III. Section 8 of the Norris-LaGuardia Act (29 U.S.C. § 108) was applicable to a request by the Petitioners for injunctive relief against a strike by the Respondent Brotherhood, when Petitioners had refused, in violation of a positive mandate of the Railway Labor Act, to meet and confer with the Brotherhood	15
Conclusion	19

TABLE OF CITATIONS

CASES:

Bhd. of Railroad Trainmen v. Chicago R. & I. R.R., 353 U.S. 30 (1957)	16
Bhd. of Railroad Trainmen v. Toledo, P. & W. R.R., 321 U.S. 50 (1944)	19

STATUTES: Page

Norris-LaGuardia Act, 29 U.S.C. §§ 101-113
Section 4 16
Section 8 ..... 2, 4, 15-18

Public Law 88-108, 77 Stat. 132 ..... *passim*
Section 4 6

Public Law 90-154, 81 Stat. 122
Section 5(a) 8

Railway Labor Act, 45 U.S.C. §§ 151-164
Section 6 ..... 2, 3, 12
Section 7 8
Section 8 8
Section 9 8

MISCELLANEOUS:

Senate Report on S. J. Res. No. 102, S. Rept. 459, August 23, 1963 ..... 5, 7, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 863

THE AKRON & BARBERTON BELT RAILROAD COMPANY, ET AL., *Petitioners,*

v.

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL., *Respondents.*

OPPOSITION OF RESPONDENTS BROTHERHOOD OF RAILROAD TRAINMEN, SWITCHMEN'S UNION OF NORTH AMERICA, AND BILL DOAK LODGE DIVISION 584

OPINIONS BELOW

The opinions of the District Court (Appendices A, B, and D) relevant to this Opposition are reported at 250 F. Supp. 691, 252 F. Supp. 207, and 254 F. Supp. 306. The opinion and supplemental opinion of the Court of Appeals (Appendices E and F) have not yet been officially reported. They are unofficially reported at 65 LRRM 2229 and 65 LRRM 2995.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether procedures established by the Award of Arbitration Board No. 282 for modifying rules governing the consist of train crews during the period of the Award, remain available after the expiration of the Award, for further modification of such rules.

2. Whether procedures initiated under Section III of the Award of Arbitration Board No. 282, but not completed before the expiration of the Award, could be completed thereafter.

3. Whether notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156), served during the period of the Award of Arbitration Board No. 282, proposing changes in crew-consist rules to become effective after the expiration of the Award, were effective to require negotiations prior to the expiration of the Award.

4. Whether Section 8 of the Norris-LaGuardia Act (29 U.S.C. § 108) was applicable to a request by the Petitioners for injunctive relief against a threatened strike by Respondent Brotherhood of Railroad Trainmen when the Petitioners had refused, in violation of a positive mandate of the Railway Labor Act, to negotiate with the Brotherhood with respect to the dispute that led to the threatened strike.

STATEMENT OF THE CASE

The petition seeks review of a judgment entered by the Court below on July 31, 1967. (App. 91a.) These Respondents likewise have filed with this Court a petition to review that judgment. (No. 861) The petition

in No. 861 sets forth in detail our statement of the case and we respectfully refer the Court to that petition for our statement of the facts involved herein.

THE WRIT SHOULD NOT BE GRANTED

The Award of Arbitration Board No. 282 did not arise from an agreement of the parties to arbitrate. It resulted from an Act of Congress (Public Law 88-108, 77 Stat. 132) and was designed to prevent an imminent national railroad strike threatening the national interest. The extraordinary means adopted by Congress to deal with the situation was compulsory arbitration of the basic disputes.

Accordingly, the answers to the issues raised by the Petitioners, concerning the effect of the expiration of the compulsory Arbitration Award on the procedures contained in the Award, and the effectiveness of notices served under Section 6 of the Railway Labor Act (45 U.S.C. § 156) seeking negotiations during the period of the Award to establish work rules to become effective upon the expiration of the Award, are not to be found by an examination of the law applicable to *agreements* under the Railway Labor Act, as argued by Petitioners, but rather, by an examination of the legislative history of the enactment to determine what was the intent of Congress on the issues in question.

The Court below followed the approach of examining the legislative history of Public Law 88-108 concerning these issues. It found that the legislative history clearly and convincingly showed that Congress did not intend that procedures for making changes in work rules, authorized by its enactment, were to continue after the expiration of the Award and that the parties

were required to bargain during the period of the Award concerning the rules to be in effect upon its termination.

With respect to the finding that Section 8 of the Norris-LaGuardia Act (29 U.S.C. § 108) was applicable to the Petitioners' request for injunctive relief, the Court below found that its decision was not only consistent with, but also required by, decisions of this Court.

The decisions of the Court of Appeals sought to be reviewed here are correct and not in conflict with the decision of any other Circuit or this Court. No further review of such determinations is warranted.

I. Procedures established by the Award of Arbitration Board No. 282 for modifying rules governing the consist of train crews during the period of the Award do not remain available, after the expiration of the Award, for further modification of such rules.

When counsel for Respondent labor organizations attempted to make a closing argument before the District Court on the issue of whether the procedures established under the Award survive the Award, the District Court prevented counsel from continuing. The Court indicated that it had some difficulty in believing that the carriers would make such a contention. (JA 146-147) The Court thereafter questioned counsel for the carriers as to whether such a contention was being made. Counsel for the carriers refused to commit himself on the subject, replying merely that "I don't want to urge that on the Court this morning." (J-A 147)[1]

[1] "This morning" was the last hearing on that proceeding. The carriers did not again suggest the point until the case was in the Court of Appeals.

The colloquy concluded with the Court's comment (JA 148):

> "I wouldn't be inclined to hold that the carriers could do that, because otherwise it will be like saying that the award is at an end but you can still act under it . . . ."

The Court of Appeals affirmed the decision of the District Court almost parenthetically, in footnote 11 of its opinion of May 12, 1967, in which it held that an award of a special board that issued after the expiration of the Award was invalid and without legal significance. (App. p. 40a) It was not until the carriers pressed their contention in a petition for rehearing of the issue that the Court expanded on its ruling. (App. pp. 76a-77a).

The argument advanced by the Petitioners before this Court on this issue in no way demonstrates that the decisions of the Courts below were not correct. The Petitioners' entire argument rests upon one sentence, taken out of context, from the Senate Report accompanying S. J. 102 which became Public Law 88-108. The sentence is contained in the portion of the Report entitled "Brief Summary of the Joint Resolution." The entire paragraph in which the sentence is found provides:

> "As amended by the committee, the joint resolution is designed to insure a prompt, peaceful, and fair settlement of the 4-year-old railroad work rules dispute by collective bargaining where possible and by arbitration where bargaining has not succeeded. *It adopts the time-tested provisions of the Railway Labor Act to this purpose.*" (Emphasis added.) (Senate Report on S.J. Res. No.

102, S. Rept. 459, August 23, 1963; U.S. Code Congressional and Administrative News, 88th Cong., 1st Sess., at 833.)

The Petitioners have attempted to build an elaborate edifice upon the foundation of the one sentence emphasized above. Thus, based upon no more than the use of the words "time-tested provisions of the Railway Labor Act" they argue that the Award of Arbitration Board No. 282, which was rendered pursuant to an Act of Congress providing for *compulsory arbitration* of the work rules dispute, was "integrated" for *all* purposes into the Railway Labor Act and is to be considered as if it were the result of an *agreement* between the parties to arbitrate. Having "established" in their view that the compulsory Arbitration Award is an agreement of the parties, the remainder of the Petitioners' argument is devoted to a discussion of the law applicable to the status of rules and procedures established by an agreement of parties upon the expiration of the agreement.

We need look no further than Public Law 88-108 itself for the plain error in the Petitioners' basic premise. That enactment, in clear and unequivocal terms, sets forth the extent to which the "time-tested provisions of the Railway Labor Act" were incorporated into the compulsory arbitration statute. Section 4 of Public Law 88-108 provided (App. 114a):

> "To the extent not inconsistent with this joint resolution *the arbitration shall be conducted pursuant to Sections 7 and 8 of the Railway Labor Act,* the board's award shall be made and filed as provided in said sections *and shall be subject to section 9 of said Act.* The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed,

> *and the arbitration board shall report to the National Mediation Board in the same manner as arbitration boards functioning pursuant to the Railway Labor Act."* (Emphasis added.)

The above constitutes *all* the references to the provisions of the Railway Labor Act to be found in Public Law 88-108. It is patent that Congress intended to incorporate into the compulsory arbitration statute only those provisions of the Railway Labor Act dealing with the *procedures for conducting the arbitration,* not to make the compulsory arbitration award an agreement under the Railway Labor Act. The phrase "time-tested provisions of the Railway Labor Act" contained in the Senate Report's "Brief Summary", the cornerstone of Petitioners' position, obviously refers to the statement in the preceding sentence that the joint resolution was designed to resolve the dispute "by arbitration where bargaining has not succeeded," and that *in conducting* the arbitration, the "time-tested provisions of the Railway Labor Act" were adopted.

The "Section-by-Section Analysis" of the legislation, found in the Senate Report, confirms the fact that the only provisions of the Railway Labor Act "incorporated" into the legislation were those concerned with the procedures to be followed in the arbitration. The Report states (U.S. Code Congressional and Administrative News, *supra,* at 840):

> "Section 4 would incorporate by reference sections of the Railway Labor Act *concerning the manner in which the arbitration would be conducted."* (Emphasis added.)

Furthermore, whatever else may be said with respect to Public Law 88-108, it cannot seriously be argued that

the enactment providing for compulsory arbitration is an agreement between the parties. Certainly, if Congress intended that the Arbitration Award be considered as if it were an agreement and that all its provisions were to continue in effect until changed in accordance with the provisions of the Railway Labor Act, it could easily have so provided.[2]

The reference in Public Law 88-108 to Sections 7, 8, and 9 of the Railway Labor Act shows that Congress was careful to spell out in detail the extent to which the Arbitration Award was to be subject to the provisions of the Railway Labor Act. It very clearly provided that the Board's procedures were to follow Sections 7 and 8, and nowhere "integrated" the entire Railway Labor Act into the Award.

Since the Award was not an agreement under the Railway Labor Act, the Petitioners' arguments, whatever their merit, with respect to *agreements* under the Railway Labor Act are inapposite.[3]

The Petitioners also are in error in arguing that the decision of the Court below, that the procedures of the

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[2] The facility with which Congress could have declared that the Arbitration Award should be considered an agreement is illustrated in a recent enactment of Congress providing for compulsory arbitration of a dispute between the railroads and their shop-craft employees. (Public Law 90-154, 81 Stat. 122; U.S. Code Congressional and Administrative News, 90th Cong., 1st Sess., 1368.) Section 5(a) of that Act provides (at 1370):

> "The Board's determination shall have the same effect (including the preclusion of resort to either strike or lockout) as though arrived at by agreement of the parties under the Railway Labor Act (45 U.S.C. 151 et seq.)."

[3] Incidentally, we believe those arguments are unsound on their merits too.

Arbitration Award terminated at the expiration of the Award, is inconsistent with its holding that the substantive rules created pursuant to the Award do continue in effect upon the expiration of the Award. No inconsistency exists.

The Petitioners' contention on this point was made to that Court in the Petitioners' motion for a rehearing and was rejected by the Court. The Court clearly distinguished between the substantive work rules in effect on the day the Award expired and the procedures for establishing such rules found in the Award. The Court stated (App. pp. 76a-77a):

> "The point is simply this: We think Congress meant that changes in substantive work rules issuing forth after the expiration of Award 282 should not be wrought by the compulsory edict of a board, but should either be reached by agreement of the parties or should be born out of their actions under the Railway Labor Act, an act which regulates their conduct of bargaining so as to promote the possibility of agreement, with the assistance of the National Mediation Board or other special boards.
>
> "This dominant Congressional intention means that a difference must be drawn between those actions of Board 282 and its agents prior to the expiration date of Award 282 which effected changes in substantive work rules, and those actions which merely constituted issuance of procedures for promulgating future changes in substantive work rules. The completed changes in substantive work rules continue on—unless and until changed again in accordance with the Railway Labor Act. But there is no continuance of what are in effect only procedures for issuing future changes in substantive work rules.
>
> "Those procedures constituted a special mechanism for making changes by award, and were in-

> tended to have only a two-year life. Upon the expiration of the two-year period the special machinery was exhausted and in the absence of agreement only the system of the Railway Labor Act was available for future changes in substantive work rules."

The Court below did not hold, as Petitioners contend, that the Award of Arbitration Board No. 282 became an agreement under the Railway Labor Act. The rationale for its ruling that rules modified pursuant to the Award continue in effect upon the expiration of the Award, albeit erroneous in our view,[4] was its belief that a substantive rule,

> "in effect on any particular day shall also be in effect the following day—beyond the power of either party to institute a unilateral modification—subject to change only in accordance with the procedures prescribed by the [Railway Labor] Act." (App. p. 45a.)

Thus, whatever substantive work rules were in effect on the day the Award expired, whether created by agreement of the parties or pursuant to the Arbitration Award, must remain in effect in the Court's view, unless and until changed in accordance with the procedures of the Railway Labor Act. The procedural provisions of the Arbitration Award pursuant to which these substantive work rules were in existence on the day the Award expired obviously do not come within the Court's rationale. The issue of whether the procedures continue is to be determined, as the Court below correctly held, simply by an examination of the legisla-

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[4] We have petitioned this Court to review the holding of the Court below on this issue. (No. 861).

tive history of the enactment to determine if Congress intended such procedures to continue. The Court found that Congress did not intend such result.

It is thus apparent that the issue of statutory construction raised by the petition is not that of the Railway Labor Act but that of Public Law 88-108, an Act that expired almost two years ago. This is not an issue that will recur.

We have shown that the intent of Congress is clear and unambiguous that the only provisions of the Railway Labor Act "incorporated" into Public Law 88-108 were those provisions dealing with the procedures pursuant to which the arbitration was to be conducted. We likewise have shown that the decision of the Court of Appeals that the substantive work rules continue (assuming such decision to be correct) in no way conflicts with its holding that the procedures do not. We submit that this issue does not warrant further review by this Court.

Although the Petitioners' request to review the holding of the Court below that proceedings initiated under Section III of the Arbitration Award, but not completed before the expiration of the Award, could not be completed thereafter, is set forth as a separate question, there is no separate argument on the point in the portion of the petition dealing with reasons for granting the writ. We assume, accordingly, that Petitioners' request for review of this issue is bound up with its request for review of the decision of the Court below that the procedures under the Award came to an end upon the expiration of the Award and that it concedes that there is no independent basis for this Court to review this question. We agree.

II. Notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156), served during the period of the Award of Arbitration Board No. 282, proposing changes in crew-consist rules to become effective after the expiration of the Award, were effective to require negotiations prior to the expiration of the Award.

The Petitioners' contention on this issue may be termed the "vacation from responsibility" argument. They argue that it was the *intent* of Congress that whether or not the parties would bargain during the period of the Award concerning the rules to be in effect upon the expiration of the Award was a matter left to the whim of the parties. If both parties agreed to bargain it would not be unlawful for them to do so, but if one of the parties chose not to bargain, it could sit back and await the end of the two-year period before it could be required to resume negotiations over the ultimate and dominant issues which gave rise to the dispute and which resulted in Congress taking the extraordinary step of enacting compulsory arbitration to prevent a national disaster in the form of a nation-wide rail strike.

Initially, this Court should refuse to review this question because it does not pose an issue of general importance. The issue of whether Congress intended to require the parties to bargain during the period of the Award of Arbitration Board No. 282, an award which resulted from an enactment of Congress as a "one shot solution" [5] to a particular problem, is not an issue which should occupy the time of this Court.

In any case, the decision of the Court of Appeals that the legislative history of Public Law 88-108 shows

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[5] Senate Report on S.J. Res. No. 102, S. Rept. 459, August 23, 1963; U.S. Code Congressional and Administrative News, 88th Cong., 1st Sess., p. 837.

that the parties were expected and required to bargain during the Award in an effort to find a more permanent resolution of the dispute is so clearly correct as to make further review unnecessary.

The Court's discussion of the issue began with a summary of the purposes of Public Law 88-108 with respect to bargaining requirements during the two-year period. The Court stated (App. p. 48a):

> "The principles and objectives underlying Public Law 88-108 reveal that Congress placed a high premium on the opportunity for continued collective bargaining *during the life of the Award,* in the hope and expectation, apparently shared at that time by the parties themselves, that the unions and carriers would themselves work out a long range solution to these sensitive problems by the traditional devices of collective bargaining. . . . [B]oth the statute and the Award expressly contemplated that the parties were free to alter or extend the rules fixed by Award.[19]

> "[19] Indeed, on the crew consist issue, Section III. A(1) of the Award, remanded the dispute to local properties 'for negotiation', and only if these further efforts to reach a settlement proved pointless were special boards of adjustment to be convened to fix . . . temporary rules."

The Court examined the legislative history of the enactment and found that it supported its conclusion that bargaining was mandatory during the period of the Award. The Court stated (App. pp. 48a-49a):

> "Public Law 88-100 established a procedure for formulating rules to govern for up to two years, in the absence of a negotiated pact. This did not displace the otherwise applicable provisions of the Railway Labor Act on the duty to bargain on changes proposed to become effective subsequent to the two-year period. President Kennedy in his

message to Congress expressed the desire that the parties continue to confer on the ultimate resolution of their disputes.[20] A chief spokesman for the carriers, Mr. J. E. Wolfe,[21] assured the Senate Committee that the carriers understood that the Administration's bill 'imposes a duty on the parties to attempt to settle their differences' and would 'protect the public interest as a result of the establishment of these interim rules for a period of 2 years or less while the parties undertake, through collective bargaining, to bring about a more permanent solution of the problems.'[22] We are aware that in the reshaping of the measure the duty to bargain on the work rules was not expressly spelled out, but the plan was surely retained. Indeed the preambles of both measures expressly and unequivocally proclaimed the care taken to select a system which solved the immediate emergency 'in a manner which preserves and prefers solutions reached through collective bargaining.' Changes were made by the Congress—notably the substitution of an independent *ad hoc* board for the Interstate Commerce Commission as the arbiter for the dispute.[23] *There was not a breath of a suggestion, however, that Congress intended to remove or even downgrade the policy that the parties themselves should confer in order to reach long-range solutions through collective bargaining and agreement.*" (Footnotes omitted; emphasis added.)

The Court concluded (App. 49a-50a):

> . . . In our view Public Law 88-108 was intended to work the minimum disruption of permanent railroad legislation and normal collective bargaining. The only disruption wrought, the only 'repeal by implication' was that which necessarily accompanied the objective of staving off a cataclysmic strike by imposing a temporary settlement. *We detect no glimmer of an intimation that the carriers were authorized to regard this as a two year*

hiatus in their obligation to bargain. Rather, we find much to militate against such a construction." (Emphasis added.)

The thorough and well-reasoned analysis of the Court below needs no further amplification.

The Petitioners' argument on this issue is premised on the contention that there is no definitive legislative history of Public Law 88-108 that the parties were required to bargain during the period of the Award on the rules to be in effect upon the expiration of the Award. The opinion of the Court of Appeals shows the Petitioners' premise to be patently erroneous. But even if not erroneous, it is hardly to be inferred from the absence of legislative history that Congress *sub silentio* intended to repeal for a two-year period the obligation to bargain.

III. Section 8 of the Norris-LaGuardia Act (29 U.S.C. § 108) was applicable to a request by the Petitioners for injunctive relief against a strike by the Respondent Brotherhood, when the Petitioners had refused, in violation of a positive mandate of the Railway Labor Act, to meet and confer with the Brotherhood.

The Court below found that both the Petitioners and the Brotherhood had violated positive mandates of the Railway Labor Act in the circumstances surrounding the alleged threatened strike by the Brotherhood after the expiration of the Arbitration Award.

The Court found that the Brotherhood's violation of the Railway Labor Act stemmed from its threat to strike to coerce the Petitioners to restore the crew-consist rules that were in effect prior to the Arbitration Award and which had been modified by or pursuant to that Award. The Court below affirmed the holding of

the District Court that the prior rules did not automatically again become effective and that the Brotherhood could not lawfully strike to restore such rules, until it had invoked and exhausted the applicable procedures of the Railway Labor Act.

The Court below further found, however, that the Brotherhood had attempted to utilize the applicable procedures of the Railway Labor Act but that it had been prevented from so doing because of the Petitioners' refusal to negotiate with the Brotherhood in violation of the bargaining requirements of the Railway Labor Act.

The Court below concluded that although Section 4 of the Norris-LaGuardia Act was not applicable to deprive the District Court of *jurisdiction* to issue injunctive relief against the Brotherhood because its strike would have violated a command of the Railway Labor Act, Section 8 of Norris-LaGuardia was applicable to deprive Petitioners of the right to injunctive relief because the Petitioners had themselves violated a positive command of the Railway Labor Act by refusing to negotiate with the Brotherhood concerning the very dispute that had led to the threatened strike.

The Court based its decision on the principle of "accommodation" as expressed by this Court in *Bhd. of Railroad Trainmen* v. *Chicago R. & I. R.R.*, 353 U.S. 30, 40 (1957), wherein it was held that there must be an accommodation between the Railway Labor Act and the Norris-LaGuardia Act. The Court below concluded that the principle of accommodation, as applied to the circumstances of this case, required it to find Section 8 of the Norris-LaGuardia Act applicable in order to prevent the Petitioners from obtaining an advantage from their violation of the Railway Labor Act.

The Court below stated (App. pp. 87a-88a):

> "The point is, simply, that Congress did contemplate actions to effectuate the Railway Labor Act by enjoining violations.[5] That purpose would be utterly defeated if the federal court actions involved were subject to Section 4 of the Norris-LaGuardia Act, which had provisions for withholding injunctions in labor disputes reflecting entirely different objectives.
>
> "On the other hand a ruling that Section 8 of the Norris-LaGuardia Act is applicable to actions to enjoin violations of the Railway Labor Act would not trammel but would rather further the effectuation of that Railway Labor Act, for it ensures compliance by a complainant carrier or union which cannot seek an injunction until and unless it has discharged the obligations imposed by the Railway Labor Act." (Footnote omitted.)

The Petitioners' claim that the decision of the Court below is in conflict with other decisions of this Court and other courts is erroneous. In none of the cases cited by the Petitioners was the Court confronted with the situation, found here, in which the party seeking an injunction, and claiming that the Court had jurisdiction notwithstanding Norris-LaGuardia because the other party had violated a command of the Railway Labor Act, had itself violated a positive mandate of the Railway Labor Act in its handling of the same dispute which gave rise to the injunction action.

The Court's holding that Section 8 of Norris-LaGuardia was applicable under the circumstances of this case was not in disregard of the provisions of the Railway Labor Act, but rather was a result of the accommodation of that Act and the Norris-LaGuardia Act so that the obvious purpose in the enactment of each

is preserved. To have found, in the present circumstances here involved, that Section 8 was inapplicable would result in encouraging a carrier to ignore its bargaining duties under the Railway Labor Act secure in the knowledge that a strike by a labor organization in connection with the dispute concerning which the carrier refused to bargain is enjoinable notwithstanding the carrier's unlawful conduct,—thus frustrating the purposes of both Acts. The result of the decision of the Court below is to strengthen and give additional impetus to the Railway Labor Act's mandatory provisions.

The Petitioners' argument that this Court, in the *Chicago River* case, held that whenever a court finds one provision of Norris-LaGuardia inapplicable, all provisions are rendered inoperative, is unwarranted. This Court's use of the word "accommodate" clearly was intended to mean that the two Acts should be read to be consistent and harmonious or for one not to frustrate the other. Thus. in a case in which a reading of *particular* provisions of the Norris-LaGuardia Act would result in the frustration of positive mandates of the Railway Labor Act, *such particular* provisions must yield. Even in such cases, however, other provisions of the Norris-LaGuardia Act, which continue to be consistent and harmonious with the provisions of the Railway Labor Act, continue to apply. This rationale is particularly appropriate here where the continued effectiveness of Section 8 of Norris-LaGuardia will prevent the Petitioners from profiting from their failure to comply with mandates of the Railway Labor Act. All the Court below did was to apply section 8 of Norris-LaGuardia to the extent that it contains a statutory declaration of the "clean hands" doctrine. It is

difficult to understand a contention that such an application was error. Cf. *Bhd. of Railroad Trainmen* v. *Toledo, P. & W. R.R.*, 321 U.S. 50 (1944).

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

MILTON KRAMER
LESTER P. SCHOENE
MARTIN W. FINGERHUT
Attorneys for Respondents Brotherhood of Railroad Trainmen, Switchmen's Union of North America, and Bill Doak Lodge Division 584.

SCHOENE AND KRAMER
1625 K Street, N.W.
Washington, D. C. 20006

December, 1967.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 863

THE AKRON & BARBERTON BELT RAILROAD COMPANY, ET AL., *Petitioners,*

v.

BROTHERHOOD OF RAILROAD TRAINMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, SWITCHMEN'S UNION OF NORTH AMERICA, AND BILL DOAK LODGE DIVISION 584, BROTHERHOOD OF RAILROAD TRAINMEN, *Respondents.*

Brief of Order of Railway Conductors and Brakemen In Opposition To Petition For Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JAMES D. HILL
806 15th Street N. W.
Washington, D. C.

HARRY E. WILMARTH
1120 Merchants National
Bank Building
Cedar Rapids, Iowa

Attorneys for Respondent, Order of Railway Conductors and Brakemen

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TABLE OF CONTENTS

Page

Questions presented 1

Argument

1. The Court below correctly held that petitioners may not continue to eliminate trainmen positions under the procedures of the Award of Arbitration Board No. 282, after expiration of the Award.... 3

2. The Court below correctly held that petitioners breached their duty to bargain with respondents during the two-year period of effectiveness of the Award, concerning proposals to resolve the dispute 10

3. The Court below correctly held that, because of petitioners' violation of statutory duty to bargain with respondents, they are barred from injunctive relief against respondents 17

Conclusion 21

CITATIONS

Cases:

Brotherhood of Locomotive Engineers v. Chicago, Rock Island & Pacific R. Co., 382 U.S. 423 (1966) 7, 14

Brotherhood of Railroad Trainmen v. Toledo, P. & W. R.R., 321 U.S. 50 (1943) 19

Butte, Anaconda & P. Ry. Co. v. Brotherhood of L. F. & E., 268 F. 2d 54 (C.A. 9, 1959) 20

Elgin, Joliet & Eastern Ry. Co. v. Burley, 325 U.S. 711 (1945) 15

Hilbert v. Pennsylvania R. Co., 290 F. 2d 881 (C.A. 7, 1961) 20

Manion v. Kansas City Terminal Railway Co., 353 U.S. 706 (1957) 20

Manning v. American Airlines, 221 F. Supp. 301 (S.D. N.Y., 1963) 17

Page

Manning v. American Airlines, 329 F. 2d 32 (C.A. 2, 1964) 8, 9
Missouri-Illinois R. Co. v. Order of Railway Conductors, 322 F. 2d 793 (C.A. 8, 1963) 16
N.L.R.B. v. Sands Mfg. Co., 306 U.S. 332 (1939) 16
Order of Railroad Telegraphers v. Chicago and Northwestern R. Co., 362 U.S. 330 (1960) 15, 20
Order of Railway Conductors & Brakemen v. Spokane, Portland & Seattle Ry. Co., 366 F. 2d 99 (C.A. 9, 1966) cert. den. 385 U.S. 1025 ..... 16, 17
Rutland Railway Corp. v. Brotherhood of Loc. Eng., 307 F. 2d 21 (C.A. 2, 1962) 20
Westchester Lodge 2186 v. Railway Express Agency, 329 F. 2d 748 (C.A. 2, 1964) 20

STATUTES:

Public Law 88-108 ..... 2, 7, 8, 9
Norris-LaGuardia Act, 29 U.S.C. § 101, et seq. 3, 18, 19
Railway Labor Act, 45 U.S.C. § 151, et seq. 7, 9, 18

MISCELLANEOUS:

Hearings before the Senate Committee on Commerce on S. J. Res. 102, 88th Congress, 1st Session ... 5, 6, 12, 13
Hearings before the House Committee on Interstate and Foreign Commerce on H. J. Res. 515, 88th Congress, 1st Session 5, 6, 12, 13
Senate Report No. 459, 88th Congress 6
House Report No. 713, 88th Congress 6
109 Cong. Rec. 15976, 16130 6-7
50 Am. Jur. p. 564 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 863

THE AKRON & BARBERTON BELT RAILROAD COMPANY, ET AL., *Petitioners*,

v.

BROTHERHOOD OF RAILROAD TRAINMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, SWITCHMEN'S UNION OF NORTH AMERICA, AND BILL DOAK LODGE DIVISION 584, BROTHERHOOD OF RAILROAD TRAINMEN, *Respondents*.

Brief of Order of Railway Conductors and Brakemen In Opposition To Petition For Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED

Petitioners seek review of portions of the decisions of the Court below dated May 12, 1967 and July 31, 1967 (App. 33a, 75a). Respondents have filed petitions for review of other portions of the decisions below which are now pending before the Court (Nos.

861 and 862). Petitioners have presented four questions for review; in argument they have reversed the order of questions 1 and 2, and do not appear to have made any argument in support of question 3. Respondent ORCB submits that the questions presented by petitioners should be stated as follows:

1. (Petitioners' question No. 2) The Award of Arbitration Board No. 282 authorized petitioners to discontinue trainman positions by special procedures created by the Award, for a period of two years. The Arbitration Board provided that "this Award shall continue in force for two years from the date it takes effect, . . ." (App. 110a). The Award was based on a special law which also provided that "the Award shall continue in force . . . not to exceed two years . . . ." (App. 114a). May the petitioners continue to eliminate trainman positions under the special procedures of the Award, after the end of the two-year period and termination of the effective period of the Award? Or did the Court below correctly hold that "those procedures constituted a special mechanism for making changes by award, and were intended to have only a two-year life"? (App. 77a)

2. (Petitioners' question No. 1) Was it the intent of Public Law 88-108 and the Award of Arbitration Board No. 282 to require the parties to the crew-consist dispute to continue negotiations to resolve the dispute during the two-year period of effectiveness of the Award, or did Congress and the Arbitration Board intend to provide a two-year moratorium on all efforts to resolve the dispute? Did the Court below correctly hold that the petitioning carriers "must be held to have breached their statutory duty under the Railway

Labor Act to confer and bargain" when they "flatly refuse to engage in any statutory bargaining whatever prior to the expiration date"? (App. 53a-54a)

3. (Petitioners' question No. 4) Did the Court below correctly hold, because petitioners "flatly refused to engage in any statutory bargaining whatever," in violation of their obligations under the Railway Labor Act and Section III of the Award, that they "lack clean hands" and were barred from injunctive relief against respondents by the provisions of Section 8 of the Norris-LaGuardia Act?

ARGUMENT

The decision of the Court below on each of the questions presented by petitioners was correct. The rulings below are not in conflict with applicable decisions of this Court, or with decisions of other Courts of Appeal. No issues of fact are presented, for all facts were stipulated before the District Court. The reasons for review advanced by petitioners raise no questions of law of sufficient importance or merit to warrant consideration by this Court.

I

Petitioners assert that "This Court should review the holding that the procedures established by the Award for changing crew-consist rules could neither be initiated nor completed after expiration of the Award . . . ." (Petition, pp. 12-23). The petition does not make clear the purpose of this contention, nor the consequences which would flow from its adoption. During the two-year period of the Award petitioners allege that they secured the elimination of 7574 trainmen positions. What they seek is an adjudication that

they may continue to eliminate additional positions, by serving notices, and referring them to Special Boards of Adjustment under the procedures established by Section III of the Award (App. 104a), indefinitely into the future. Before the District Court and the Court of Appeals, the Respondent labor organizations contended that, at the end of the two-year period, the interim two-year rules expired, except to the extent that they had been incorporated into permanent agreements between the parties and that, where no agreement had been reached, pre-existing crew-consists must be re-established. The carriers contended that the positions eliminated by the interim rules created by Awards of Special Boards of Adjustment continued to be eliminated and, further, that the carriers could continue to eliminate additional positions under the procedures of the Award, indefinitely. The Court below took a position between these contentions; it held that positions eliminated during the two-year period continued to be eliminated, but that no additional positions might be eliminated after January 25, 1966, under the procedures of the Award. The Court below held that "those procedures constituted a special mechanism for making changes by award, and were intended to have only a two-year life." (App. 77a).

It is the position of the respondent labor organizations that the Congress and the Arbitration Board intended the interim rules (authorizing the elimination of 7574 positions) to expire at the end of the two-year period of effectiveness of the Award, unless adopted as permanent rules by agreement of the parties, and that the ruling of the Court below that the interim rules continue to survive as permanent rules between the parties after January 25, 1966, is contrary to the intent

of Congress and of the Arbitration Board. This contention of the labor organizations has been presented to this Court by their petitions for writs of certiorari in Nos. 861 and 862. The further contention of the petitioning carriers, that they may continue to utilize the procedures of the Award to eliminate additional trainman positions permanently into the future would completely frustrate the intent of Congress and the Board, and make a complete mockery of the law and of the Award.

President Kennedy asked Congress for emergency legislation authorizing "interim work rule changes . . ." for a two-year period . . . while awaiting the results of further bargaining by the parties." (Senate hearings, pp. 8-10)[1] He emphasized that he was not recommending "a general permanent compulsory arbitration law" but one which "provides only for interim decisions." Secretary of Labor Wirtz, who testified in support of the President's bill, said to the House Commerce Committee that at the end of the two-year period "the interim rule would at that point no longer be effective" (House hearings, p. 55), and agreed that ". . . that decision goes into effect and stays in effect until either the parties reach an agreement by collective bargaining or the 2-year period expires." (House hearings, p. 59) The representatives of the carriers also repeatedly represented to Congress that the Award would be "binding for two years", "it lasts only two years, . . . then it expires." (House hearings, pp. 533,

[1] References hereafter to "Senate hearings" and "House hearings" refer, respectively, to Hearings before the Senate Committee on Commerce on S.J. Res. 102, 88th Cong., 1st Sess. and to Hearings before the House Committee on Interstate and Foreign Commerce on H.J. Res. No. 565, 88th Cong., 1st Sess.

551, 565; Senate hearings, pp. 364, 370-1, 375) Indeed, the representative of the carriers opposed a suggestion that a two-year period was inadequate, saying: "I believe that we consider that interim proposition, . . . that 2 years is about as far as we should go." (House hearings, p. 555) The legislative history is replete with identical representations as to the effect of the proposed legislation. See House hearings, pp. 64, 172, 174, 605, 982; Senate hearings, pp. 49-51, 62-63, 414-415, 427.

The House and Senate Committee reports repeated the same understanding. Senate Report No. 459, 88th Congress, said:

> "Under the terms of the resolution, the arbitration award would be binding for no more than 2 years, unless the parties mutually agree to a different period. The Committee has imposed this limitation in harmony with the President's recommendation, in order to closely limit the scope and impact of the resolution." (U.S. Code Congressional and Administrative News, 1963, p. 1406)

And the House Committee, in House Report No. 713, 88th Congress, said:

> "The arbitration award is to be in effect for the period determined by the arbitration board but that period cannot exceed 2 years from the date the award takes effect; however, the award can be in effect for a different period if the parties agree thereto."

On the floor of the House, Chairman Harris of the House Commerce Committee described the situation which would prevail at the end of the two-year period by agreeing that "then it is as if this resolution had never been passed at that time." (109 Cong. Rec.

16130) And on the floor of the Senate, Senator Morse similarly described it, saying:

> "It appears to be the intention in this section, read in the light of the scheme of the resolution and of the legislative background, that these rules will provide a basis for the manning of the trains for the interim period only.
>
> "Stated conversely, the resolution does not authorize the Commission to approve rules which are dispositive of the entire manning issue for the indefinite future. The emphasis is on interim work rule procedures to be effective only until such time as the parties reach agreement regarding the entire matter or 2 years following the date the interim rule goes into effect, whichever occurs sooner." (109 Cong. Rec. 15976)

Both P.L. 88-108 and the Award specifically provided that the Award should be limited to a duration of two years. (App. 110a, 114a) Thereafter this Court had occasion to interpret the effect of the Award, and so described it. In *Brotherhood of Locomotive Engineers* v. *Chicago, Rock Island and Pacific R. Co.*, 382 U.S. 423 (January 31, 1966) this Court said:

> "The arbitration board was given power to resolve the dispute over the firemen and full-crew questions. Their award was to be a complete and final disposition of these issues for a period not exceeding two years from the date the awards would take effect . . . Congress wanted to do as little as possible in solving the dispute which was before it . . ."

The effect of the carriers' contention, that they have the right to continue to abolish crew positions under the guidelines of the Award indefinitely into the future, would make permanent what Congress and the Arbitra-

tion Board intended to be temporary. It would defeat the understanding and intention of the President, the Congress and the Arbitration Board itself. It would create a permanent system of compulsory arbitration of "major" railway labor disputes. It would continue, as permanent general law, a temporary set of rules and guidelines which were created for a two-year period only.

The carriers' contention is, of course, not based on the language of the law, or of the Award, or of their legislative history—all of these are at complete variance with the carriers' position. The contention is based solely on the syllogism that (a) under the Railway Labor Act a collective bargaining agreement for a specified term continues to survive beyond its agreed term until one party to the agreement serves and processes a Section 6 notice to terminate it; (b) an arbitration award imposed by law has the same consequences and effect as a voluntary agreement between parties; (c) P.L. 88-108 and the Award of Arbitration Board 282 must yield to the general principles governing voluntary agreements reached under the Railway Labor Act; (d) ergo; the Award continues to survive its express termination period irrespective of the intent of Congress and the Arbitration Board, the language of the law, and the language of the Award. We suggest that none of these propositions is valid. There is no support for the unusual contention that a collective bargaining agreement for a specified term continues to survive its agreed term until a party to the agreement serves and processes a Section 6 notice to terminate it. Petitioners cite no authority for this proposition other than a casual reference to *Manning* v. *American Airlines, Inc.*, 329 F. 2d 32 (C.A. 2, 1964),

which is not in point. There, before the termination date of a collective bargaining agreement the labor organization served a notice under Section 6 of the Railway Labor Act (App. 116a) proposing that the agreement be extended. Because of the language of Section 6 that a carrier may not alter existing rules and working conditions while a Section 6 notice is pending, the Court in *Manning* held that the carrier was obligated to maintain the rules and working conditions which obtained during the life of the agreement until the Section 6 notice had proceeded through the required steps of conference and mediation. Petitioners' repetition of a phrase from *Manning* that the "effect of § 6 is to prolong agreements subject to its provisions regardless of what they say as to termination" is the misuse of a phrase torn from context. It is not Section 6 which automatically prolongs all agreements; it is the service and pendency of a notice under Section 6 to extend the agreement which requires continuation of the same rules and working conditions, until the notice has proceeded through the required steps of conference and mediation. In the instant situation the petitioning carriers served no Section 6 notice on the respondents during the two-year period, proposing an extention of the effective period of the Award. On its termination date it was not subject to the provisions of Section 6, and was not continued in force.

Further, no authority or logical reason is advanced by petitioners to support the proposition that the language and intent of P.L. 88-108 must yield to some unspecified contrary provision of Railway Labor Act. The Railway Labor Act contains no requirement that either voluntary agreements or arbitration awards

shall continue to be effective beyond their express termination date. There is no inconsistency between the two enactments and, even if there were, "it is well settled that a special or specific law repeals an earlier general or broad law to the extent of any irreconcilable conflict between their provisions." 50 Am. Jur. p. 564.

The contention of the carriers that they may continue to eliminate trainmen positions indefinitely into the future, on the ground that the Award of Arbitration Board 282 has become a permanent part of the collecitve bargaining agreements between the parties, despite the intention of Congress and the Arbitration Board, has now been rejected by two courts. (App. 11a, 21a-22a, 76a-77a) The district judge was incredulously unable to believe that such a contention was seriously urged. (J.A. in No. 861, p. 146-148). We think the contention may fairly be described as frivolous.

II

The petitioning carriers also seek review of the holding of the Court below that they "have breached their duty to enter negotiations in good faith" (App. 54a) with the labor organizations during the two-year period of effectiveness of the Award. (Petition, pp. 23-27)

Arbitration Board No. 282, in its Award, directed the parties to return to their local properties and negotiate local agreements which would permanently dispose of the crew-consist issue. The interim two-year rules created by the Board were only to govern "pending the consummation of local agreements disposing of the issue, . . ." (App. 104a). During the two-year period the respondent labor organizations, in compliance with the mandate of the Board, served notices proposing agreements which would provide for a crew of

one conductor and two brakemen, in accordance with the standard suggested by the Board. But the petitioning carriers adamantly refused to enter into such agreements, or even to bargain concerning them (J.A., p. 78-79; App. 53a-54a). The Court below held the carriers' refusal to bargain with the respondent ORCB to be justified, on the ground that the notices served by this respondent proposed agreements to become effective during the two-year period of effectiveness of the Board. However, the Court below also held the carriers' refusal to bargain with the BRT and the SUNA to be wrongful on the ground that the notices served by those organizations contemplated agreements to become effective at the end of the two-year period. The Court of Appeals said:

> "They had an obligation, we think, to bargain about changes to become effective with the expiration of the Award. But we also think that they had no obligation to bargain about a proposal to make changes during the life of the Award." (App. 56a)

Petitioners now seek review of that portion of the decision of the Court below, holding that during the two-year period of effectiveness of the Award, they were required to bargain with the labor organizations in an attempt to reach lasting agreements.[2] We submit

---

[2] This argument is, of course, addressed to that portion of the decision of the Court below holding that petitioners defaulted in their obligation to bargain with BRT and SUNA. The contention also affects this respondent because, if sustained by this Court, it would necessarily require rejection of the petition for a writ of certiorari filed by the ORCB (No. 862), which seeks review of that portion of the decision of the Court of Appeals holding that the carriers were not obligated to bargain with the ORCB during the two-year period of the effectiveness of the Award, because of alleged procedural error in the language of the ORCB notices.

that the contention of petitioners is plainly contrary to the express intent of Congress and of the Arbitration Board. The President's message to Congress, the House and Senate Committee hearings, and the Award of Arbitration Board No. 282 make clear beyond doubt that the primary purpose of the law, and of the Award, was to create a breathing period of two years during which the parties were expected to make further attempts to resolve their disputes. President Kennedy urged the enactment of legislation which "encourages the parties to achieve their own solutions through collective bargaining" and which would provide "an interim remedy while awaiting the results of further bargaining by the parties," and "for such length of time as the parties are unable to agree by collective bargaining." (Senate hearings, pp. 8-10) Secretary of Labor Wirtz said to the House Commerce Committee that the Administration proposed interim rules for a two-year period because "it seemed to me that that was the period during which a rule could be worked out at that point by agreement, . . ." (House hearings, p. 109). To the Senate Commerce Committee Secretary Wirtz said:

> ". . . what is contemplated here is a decision which would have controlling effect during that period until they agree. No question about it." (Senate hearings, p. 51)

Chairman Walrath of the Interstate Commerce Commission said that, during the two-year period, ". . . at any moment that they reach agreement on any of these issues, they could by that very agreement supersede anything we did." (Senate hearings, p. 412). Mr. Daniel Loomis, President of the Association of Amer-

ican Railroads, urged enactment of the law and denied that it constituted final and binding arbitration saying:

> "I think there what the difference is that compulsory arbitration settles and disposes of a dispute and decides it with finality. This bill or joint resolution does not do that. . . . The resolution has—it lasts only 2 years, and secondly only interim orders can be entered by the Interstate Commerce Commission. And third, then it expires. It also presupposes continued negotiations, too, which you would not have in the case of compulsory arbitration. That would settle the whole matter, compulsory arbitration." (House hearings, p. 565).

And Mr. James E. Wolfe, Chairman of the National Railway Labor Conference, also urging enactment of the law, said:

> "As I understand the resolution, it imposes a duty upon the parties to attempt to settle their differences. But at the same time it is designed to protect the public interest as a result of the establishment of these interim rules for a period of two years or less, while the parties undertake, through collective bargaining, to bring about a more permanent solution to their problems." (Senate hearings, p. 375).

The legislative history contains repeated similar expressions of intent and purpose. This legislative intent culminated in Section III of the Award of Arbitration Board No. 282, which provided that "the issue of crew-consist . . . shall be remanded to the local properties for negotiation . . .", and required maintenance of existing crew-consist rules and practices "pending the consummation of local agreements disposing of the issue, . . ." (App. 104a).

Petitioners seek to justify the breach of their representations to the Congress, their frustration of Congressional intent, and their adamant disobedience of the directive of the Arbitration Board by two arguments. First, they assert that the legislative history is irrelevant because "the Administration's bill was revised to eliminate the requirement for such bargaining." This contention seeks to re-argue the decision of this Court in *Brotherhood of Locomotive Engineers* v. *Chicago, Rock Island and Pacific R. Co.*, 382 U.S. 423 (1966) in which this Court said: "Congress enacted the bill proposed by the President with one significant change." (substitution of a Board of Arbitration for the Interstate Commerce Commission).

Second, the carriers argue that, as a matter of general legal principle, a party to a collective bargaining agreement has no obligation to bargain concerning proposals for modification, termination or extension until after the expiration of the existing agreement. Stated conversely, petitioners contend that a party may not validly open negotiations for a successor agreement until after expiration of the current agreement. Ordinarily where a collective bargaining agreement exists for a specified term it is customary for the parties to serve "openers" looking toward a renewal well in advance of the expiration date. Petitioners' contention that such a notice may only validly be served *after* expiration of the existing agreement would upset well-settled industrial practices of long standing. It would create an unhealthy period of hiatus between the expiration of a collective bargaining agreement and execution of a successor, during which no contract existed between the parties, with all of the industrial strife which such a situation would cause. It would be

contrary to this Court's understanding of the bargaining requirements created by the Railway Labor Act, expressed in *Elgin, Joliet & Eastern Ry. Co.* v. *Burley*, 325 U.S. 711 (1945). There, distinguishing between "major" disputes over the making of new agreements, and "minor" disputes over the interpretation of existing agreements, this Court said:

> "The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement *or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy.* They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
>
> * * * *
>
> "To settle for the future alone, without reference to or effect upon the past, is in fact to bargain collectively, that is, to make a collective agreement. That authority is conferred independently of the power to deal with grievances, as a part of the power to contract 'concerning rates of pay, rules, or working conditions.' It includes the power to make a new agreement settling for the future a dispute concerning the coverage or meaning of a pre-existing agreement. For *the collective bargaining power is not exhausted by being once exercised; it covers changing the terms of an existing agreement as well as making one in the first place.*" (emphasis added).

And in *Order of Railroad Telegraphers* v. *Chicago & N.W.R. Co.*, 362 U.S. 330 (1960) this Court rejected the contention of a carrier that it was "unlawful" for a labor organization to seek a change in an existing agreement, saying:

> "Plainly the controversy here relates to an effort on the part of the union to change the 'terms' of an existing collective bargaining agreement. . . .

> "Here, far from violating the Railway Labor Act, the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes 'concerning rates of pay, rules, and working conditions.' 45 U.S.C. § 152, First, 45 U.S.C.A. § 152, subd. 1. Moreover, neither the respondent nor anyone else points to any other specific legal command that the union violated here by attempting to bring about a change in its collective bargaining agreement."

See also: *Order of Railway Conductors and Brakemen* v. *Spokane, Portland & Seattle Ry. Co.*, 366 F. 2d 99 (C.A. 9, 1966) cert. den. 385 U.S. 1025; *Missouri-Illinois R. Co.* v. *Order of Railway Conductors*, 322 F. 2d 793 (C.A. 8, 1963). See also this Court's similar interpretation of an employee's duty to bargain under the National Labor Relations Act, expressed in *N.L.R.B.* v. *Sands Mfg. Co.*, 306 U.S. 332 (1939):

> "The legislative history of the Act goes far to indicate that the purpose of the statute was to compel employers to bargain collectively with their employes to the end that employment contracts binding on both parties should be made. But *we assume that the Act imposes upon the employer the further obligation to meet and bargain with his employes' representatives respecting proposed changes of an existing contract* and also to discuss with them its true interpretation, if there is any doubt as to its meaning." (emphasis added).

While it may well be that parties to a collective bargaining agreement might agree not to seek further negotiations with the other until after the expiration of the agreement, (although the validity of such an

agreement was questioned by the Ninth Circuit in *Order of Railway Conductors and Brakemen* v. *Spokane, Portland and Seattle R. Co.*, supra, and in *Manning* v. *American Airlines, Inc.*, 221 F. Supp. 301, 307 (S.D.N.Y., 1963) aff'd 329 F. 2d 32), such a waiver of statutory right must rest on an agreement between the parties to so refrain. What is involved here is not an agreement, but an arbitration award imposed by law, and its terms and limitations must depend upon the language and intent of the Award and its enabling law. Here it is crystal-clear that, far from prohibiting negotiations during the two-year period, the law intended, and the Award required, such negotiations.

In essence, it is petitioners' contention that they have successfully misrepresented the consequences of enactment of the law to the Congress, violated their commitment to the Congress to bargain, and resisted the command of the Arbitration Board. They ask this Court to put its seal of approval on such conduct in order that they may profit from their own deliberate wrongs. We submit that this contention raises no substantial question of law which meets the standards of Rule 19.

III

During the two-year period of effectiveness of the Award of Arbitration Board 282, the respondent labor organizations served on the petitioning carriers notices proposing crew-consist agreements calling for one conductor and two brakemen. But petitioners, as they stipulated in the District Court (J.A. 78-79), and as found by the Court of Appeals "flatly refused to engage in any statutory bargaining whatever prior to the expiration date . . .", and ". . . must be held to have breached their statutory duty under the Railway Labor

Act to confer and bargain on the merits of the proposed changes in work rules." (App. 53a-54a) This duty was imposed not only by Sections 5 and 6 of the Railway Labor Act (App. 115a-116a) but also by Section III A(1) of the Award (App. 104a).

Several days before expiration of the two-year period, petitioners commenced the instant action, and obtained a temporary restraining order against respondents, enjoining a work-stoppage because of their refusal to negotiate or mediate (J.A. 28). The Court below held the issuance of the restraining order to be erroneous because "the complainants lack clean hands" and were ineligible for injunctive relief by virtue of Section 8 of the Norris-LaGuardia Act. (App. 86a-89a). Petitioners seek review of this ruling (Petition pp. 27-32), arguing that "neither Section 8 nor any other provision of Norris-LaGuardia applies to a restraining order or other injunctive relief designed to compel compliance with a mandate of the Railway Labor Act." Petitioners do not state what mandate of the Railway Labor Act this wrongfully-issued restraining order was designed to enforce compliance with.[3]

---

[3] Petitioners' assertion of error below is directed against a ruling which was in favor of the respondent Brotherhood of Railroad Trainmen. (App. 86a-89a). The Court below held the restraining order to have been properly issued as against the respondent ORCB, on the ground that the Section 6 notices served by this respondent were premature, and did not require bargaining by the petitioning carriers; hence, petitioners were held not to have defaulted any statutory duty to bargain with the ORCB. (App. 89a). The Respondent ORCB has petitioned this Court to review that ruling (No. 862). Petitioner's request that this Court review the portion of the decision below favorable to the BRT is of concern to this respondent for, if this Court should sustain petitioner's contention, it would necessarily require denial of that portion of the petition for a writ of certiorari filed by this respondent.

Simply, petitioners seek reconsideration of this Court's decision in *Brotherhood of Railroad Trainmen* v. *Toledo, P.&W. R. Co.*, 321 U.S. 50 (1943). There, this Court held that Section 8 of the Norris-LaGuardia Act barred injunctive relief to a carrier which had engaged in arbitration and mediation of a labor dispute, as required by law, but which had refused to submit the dispute to binding arbitration, even though the arbitration of "major" disputes is not compulsory. This court said:

> "The question broadly stated, is whether respondent made 'every reasonable effort' to settle the dispute, as the section requires. On the facts this narrows to whether its steadfast refusal to agree to arbitration under the Railway Labor Act's provisions made the section operative. We think it did, with the consequence that the federal courts were deprived of the power to afford injunctive relief and respondent was remitted to other forms of legal remedy which remained available. . . .
>
> Section 8 is not limited to railway labor disputes. But it includes them. And its very terms show they were used in explicit contemplation of the procedures and machinery then existing under the Railway Labor Act and with the intent of making their exhaustion conditions for securing injunctive relief, not singly or alternatively, but conjunctively or successively, when available. . . .
>
> Respondent's failure or refusal to arbitrate has not violated any obligation imposed upon it, whether by the Railway Labor Act or by the Norris-LaGuardia Act. No one has recourse against it by legal means on account of this failure. Respondent is free to arbitrate or not, as it chooses. But if it refuses, it loses the legal right to have an injunction issued by a federal court or, to put the matter more accurately, it fails to perfect the

> right to such relief. This is not compulsory arbitration. It is compulsory choice between the right to decline arbitration and the right to have the aid of equity in a federal court. . . .
>
> Arbitration under the Railway Labor Act was available, afforded a method for settlement Congress itself has provided, and until respondent accepted this method it had not made 'every reasonable effort to settle' the dispute, as Section 8 requires."

See also, *Order of Railroad Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330 (1960); *Rutland Railway Corp.* v. *Brotherhood of Loc. Eng.*, 307 F. 2d 21, 39 (C.A. 2, 1962); *Butte, Anaconda & P. Ry. Co.* v. *Brotherhood of Loc. F. & E.*, 268 F. 2d 54, 60 (C.A. 9, 1959). In other instances this Court and the Courts of Appeals have denied injunctive relief to carriers which have failed to exhaust the remedies required by the Railway Labor Act, without specific reference to Section 8. See *Manion* v. *Kansas City Terminal Ry. Co.*, 353 U.S. 927 (1957); *Hilbert* v. *Pennsylvania R. Co.*, 290 F. 2d 881, 885 (C.A. 7, 1961); *Westchester Lodge 2186* v. *Railway Express Agency*, 329 F. 2d 748, 753 (C.A. 2, 1964).

The instant case is *a fortiori*. Here, petitioners did not merely decline the voluntary step of arbitration, but the precedent legally-required steps of conference and mediation. The ruling of the Court below that this refusal barred petitioners from injunctive relief was entirely in accord with prior applicable decisions of this Court, and raises no question warranting review.

CONCLUSION

Respondents have heretofore filed petitions for a writ of certiorari seeking review of other portions of the decision below. But the questions presented by the petitioning carriers in No. 863 raise no serious issues or important questions which merit the consideration of this Court. Questions 1 and 2 present no serious or meritorious issue, and question No. 3 merely seeks to reargue a prior decision of this Court. Respondent respectfully submits that the petition presents no question which meets the standards of Rule 19 of the Court, and should be denied.

Respectfully submitted,

JAMES D. HILL
HARRY E. WILMARTH
Attorneys for Respondent,
Order of Railway Conductors
and Brakemen

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 933

BANGOR AND AROOSTOOK RAILROAD COMPANY, *et al.*, and THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*, *Petitioners*,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005
Of Counsel for Petitioners.

FRANCIS M. SHEA
RICHARD T. CONWAY
734 Fifteenth Street, N.W.
Washington, D.C. 20005

JAMES R. WOLFE
Union Station Building
Chicago, Illinois 60606
Attorneys for Petitioners.

INDEX

Table of Contents

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	4
Statement of the Case	4
Reasons for Granting the Writ	14
A. The Congress Adopted the Provisions of the Railway Labor Act in P.L. 88-108, and That Act Governs the Situation Following the Expiration of Award 282	16
B. Under the Railway Labor Act, the Rights and Duties of the Parties to A Collective Bargaining Agreement or Arbitration Award Continue After Its Expiration Date Until Changed in Accordance With the Act	20
C. Under the Railway Labor Act, Disputes as to the Meaning or Application of an Arbitration Award Are for the Arbitration Board to Decide	27
D. Under the Railway Labor Act, the Purpose and Effect of an Expiration Date in A Collective Bargaining Agreement or Arbitration Award Is to Preclude the Parties From Being Required Under the Act to Bargain Prior to Such Expiration Date About Proposed Changes in Such Agreement or Award	36
E. The Issues Involved Are Important and Should Be Reviewed by This Court	40
Conclusion	43

TABLE OF CITATIONS

Cases:

	Page
Brotherhood of Locomotive Eng. v. *Baltimore & Ohio R. Co.*, 310 F. 2d 503 (7th Cir., 1962), aff'd, 372 U.S. 284 (1963)	4, 28
Brotherhood of Loc. Fire. & Eng. v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11 (D. D.C., 1964), aff'd *per curiam*, 331 F. 2d 1020 (D.C. Cir., 1964)	5, 18, 30
Brotherhood of Railroad Trainmen v. *Certain Carriers, Etc.*, 349 F. 2d 207 (D.C. Cir., 1965)	29
Brotherhood of Rail. Trainmen v. *Chicago, M., St. P. & P. R. Co.*, 380 F. 2d 605 (D.C. Cir., 1967)	29
Brotherhood of Railroad Train. v. *Chicago, M., St. P. & P. R. Co.*, 345 F. 2d 985 (D.C. Cir., 1965)	29
Brotherhood of Rail. Train. v. *Terminal R. Ass'n. of St. L.*, 380 F. 2d 584 (D.C. Cir., 1967)	29
Brotherhood of R. Trainmen v. *St. Louis Southwestern Ry. Co.*, 380 F. 2d 603 (D.C. Cir., 1967)	29
Capitol Airways, Inc. v. *Air Line Pilots Ass'n*, 41 CCH Labor Cases ¶ 16,739 (MD Tenn., 1961)	38
Enginers v. *Chicago, R. I. & P. R. Co.*, 382 U.S. 423 (1966)	33
Felter v. *Southern Pacific Co.*, 359 U.S. 326 (1959)	21
Flight Engineers' Inter. Ass'n v. *American Airlines, Inc.*, 303 F.2d 5 (5th Cir., 1962)	37
Labor Board v. *American Ins. Co.*, 343 U.S. 395 (1952)	27
Locomotive Engineers v. *B. & O. R. Co.*, 372 U.S. 284 (1963)	5, 27
Manning v. *American Airlines, Inc.*, 329 F. 2d 32 (2d Cir., 1964)	21, 22, 25
Mid-Continent Airlines v. *Brotherhood of Railway, Etc.*, 83 F. Supp. 976 (W.D. Mo., 1949)	28
Missouri Pacific R. Co. v. *Norwood*, 283 U.S. 249 (1931)	33
New York C. & St. L. R. Co. v. *Brotherhood of Loc. Fire. & Eng.*, 358 F. 2d 464 (6th Cir., 1966)	29
Order of Railroad Telegraphers v. *New York Central R. Co.*, 181 F. 2d 114 (2d Cir., 1950)	28

Page

Railroad Passenger Train Deficit, 306 I.C.C. 417 (1959) 4
Railway Clerks v. *Florida E.C.R. Co.*, 384 U.S. 238 (1966) 20, 26
Rutland Ry. v. *Brotherhood of Loc. Eng.*, 307 F. 2d 21 (2d Cir., 1962) 38
St. Louis S.F. & T. Ry. Co. v. *Railroad Yardmasters of America*, 328 F. 2d 749 (5th Cir., 1964) 26
Southern Pacific Company v. *Brotherhood of Locomotive Firemen and Enginemen*, 56 CCH Labor Case ¶ 12,209 (D.C. Cir., 1967) 13
Telegraphers v. *Chicago & N.W. R. Co.*, 362 U.S. 330 (1960) 26
Union Pacific R. Co. v. *Price*, 360 U.S. 601 (1959) 20
United Indus. Wkrs. of Seafarers, Etc. v. *Board of Trustees*, 351 F. 2d 183 (5th Cir., 1965) 21
Westchester Lodge 2186, Etc. v. *Railway Express Agency, Inc.*, 329 F. 2d 748 (2d Cir., 1964) 25
Western Air Lines v. *Labor Commissioner*, 167 F. 2d 566 (9th Cir., 1948) 28

Statutes:

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1331 10
28 U.S.C. § 1337 10
28 U.S.C. § 2201 10
28 U.S.C. § 2202 10

Public Law 88-108:

Section 3 ..... 5, 6, 19, 39
Section 4 ..... 5, 10, 18
Section 6 19

Railway Labor Act:

Section 3 ..... 13, 37
Section 5 ..... 21, 28
Section 6 ..... 4, 20, 21, 22, 23, 24, 25, 26

Page

Section 7 ..... 5, 18, 21, 28
Section 8 ..... 5, 18, 21, 28
Section 9 ..... 18, 21, 28
Section 10 5

Oregon Laws, 1965, Chapter 462 42
Laws of Washington, 1967, Chapter 2, Sect. 1 42

Miscellaneous:

109 Cong. Rec. 16128 19
109 Cong. Rec. 16130 19
H. Rept. No. 713, 88th Cong., 1st Sess. 5
S. Rept. No. 459, 88th Cong., 1st Sess. 18, 40
H.J. Res. 565, 88th Cong., 1st Sess. 16, 17, 39
S.J. Res. 102, 88th Cong., 1st Sess. 16, 17, 39
Hearings on H.J. Res. 565, 88th Cong., 1st Sess. 17
Hearings on S.J. Res. 102, 88th Cong., 1st Sess. 17
Opinion of Neutral Members, 41 Labor Arbitration 680 (1963) 6, 7, 30, 31, 35

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No.

BANGOR AND AROOSTOOK RAILROAD COMPANY, *et al.*, and THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*, *Petitioners*,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on July 31, 1967.

Opinions Below

Petitioners are 181 railroads which filed a complaint for declaratory judgment and injunctive relief against respondent in the United States District Court for the District of Columbia Circuit.[1] The opinion of that court is reported at 253 F. Supp. 682 and is set forth in Appendix A hereto.

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[1] A complaint filed by respondent in the Northern District of Illinois against 16 of the petitioners was transferred to the District of Columbia and consolidated with the proceeding brought by petitioners.

Both sides appealed from the judgment of the District Court, and those appeals were heard and decided together in an opinion dated May 12, 1967 and a supplemental opinion dated July 31, 1967.[2] Those opinions have not yet been officially reported, but are unofficially reported at 55 CCH Labor Cases ¶ 11,912 and 56 CCH Labor Cases ¶ 12,095, and are set forth in Appendices B and C hereto.

Jurisdiction

The judgment of the Court of Appeals, set forth in Appendix D hereto, was entered on July 31, 1967. A timely petition for rehearing and for clarification was denied on September 21, 1967 in a memorandum and order, set forth in Appendix E hereto, which also modified the supplemental opinion of July 31, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Article II of the Award by Arbitration Board No. 282 (Appendix F hereto) pursuant to Public Law 88-108 (77 Stat. 132) provided, among other things, that all "agreements, rules, regulations, interpretations, and practices, however established, with respect to the employment of firemen (helpers) shall continue undisturbed except as modified by the terms of this Award." Under the "terms of this Award," the carriers were authorized to eliminate up to 90% of all firemen's assignments on diesel freight and yard locomotives, among other things. The period during which Article II of the Award "shall continue in force" expired as of the end of March 30, 1966:

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[2] Those opinions also relate to appeals from another District Court proceeding between the carriers and certain other unions which involved the crew-consist aspects (Article III) of Award 282. Petitions for writ of certiorari from the judgment in that case have been filed by both the carriers and the unions, and are now pending as Nos. 861, 862 and 863.

1. Do the rights and duties of the parties under Article II of the Award apply, unless and until changed in accordance with the Railway Labor Act, to "new runs" created after expiration of the Award and in states in which valid so-called "full crew" laws are repealed after expiration of the Award as well as in all other circumstances?

(a) Did Article II of the Award directly modify the prior rules and agreements governing the employment of firemen or did it establish a procedure for modifying such prior agreements and rules?

(b) Does Arbitration Board No. 282 have primary jurisdiction to determine issues as to the meaning and application of its Award, including the issue stated in 1(a) above?

(c) If Article II of the Award is interpreted as establishing a procedure for modifying the prior rules and agreements, does it nevertheless affect "rates of pay, rules, or working conditions" within the meaning of those terms as used in the Railway Labor Act so that such procedure continues to apply after expiration of the Award until changed in accordance with that Act?

(d) Were the prior rules and agreements modified by or pursuant to Article II of the Award in states which had valid so-called "full crew" laws, so that such rules and agreements as modified by or pursuant to the Award apply to the use of firemen after repeal of the "full crew" laws?

2. Could a union party to the Award serve carrier parties to the Award with notices of proposed changes in rules and agreements governing the employment of firemen and require the carriers to bargain upon such notices during the period prior to the expiration of the Award, when such notices proposed that the changes become effective after the expiration of the Award, or were those notices premature so as not to become effective under Section 6 of the Railway Labor Act until after the expiration of the Award?

Statutes Involved

Public Law 88-108 and relevant provisions of the Railway Labor Act are set forth in Appendix H hereto.

Statement of the Case

In 1959, the overmanning of trains resulting from obsolete work rules having little or no relation to actual manpower needs in the light of technological developments constituted a serious problem. See *Brotherhood of Locomotive Eng.* v. *Baltimore & Ohio R. Co.*, 310 F.2d 503, 505-506 (7th Cir., 1962), aff'd, 372 U.S. 284 (1963); *Railroad Passenger Train Deficit*, 306 I.C.C. 417, 480 (1959). On or about November 2, 1959, in an effort to overcome this problem, most of the nation's railroads served the unions representing their operating employees with notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156). While a number of proposals were made, the two relevant here sought, in general, to eliminate all rules requiring the use of firemen on diesel locomotives in freight and yard service and all rules which required the use of a stipulated number of trainmen (such as brakemen and helpers) in road and yard service, and to leave those matters to managerial discretion. On or about September 7, 1960, the unions served the railroads with Section 6 notices of counterproposals which, among other things, would generally require the use of a fireman on all locomotives and the use of two brakemen or helpers on all road and yard crews. JA 59-60, 74.

A Presidential Railroad Commission was appointed by the President on an *ad hoc* basis to investigate the dispute and use its best efforts to bring about a settlement (JA 61, 74). In its February 26, 1962 Report to the President, the Commission recommended generally (p. 7) that "the rules governing the manning of engines and trains and the

assignment of employees be revised to permit the elimination of unnecessary jobs and at the same time to safeguard the interests of the individual employees adversely affected." Detailed recommendations in that regard were made (Report, at 35-50, 53-60) and were accepted by the carriers, but rejected by the unions. H. Rept. No. 713, 88th Cong., 1st Sess., 7. After the validity of the carriers' proposals was upheld in litigation brought by the unions, *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963), the President appointed an emergency board under Section 10 of the Railway Labor Act (45 U.S.C. § 160). The recommendations of Emergency Board No. 154 generally paralleled those of the Commission, and were accepted by the carriers and rejected by the unions. H. Rept. No. 713, *supra* at 7.

The report by the emergency board exhausted the procedures of the Railway Labor Act and, following the expiration of 30 days, the carriers were free to implement their proposals and the unions were free to strike or engage in other self help. *Locomotive Engineers* v. *B. & O. R. Co.*, *supra* at 291. When it became apparent that a disastrous nationwide railroad strike was imminent, the President proposed preventive legislation and the Congress responded by enacting Public Law 88-108 (77 Stat. 132). Under that legislation, the two key issues concerning the rules governing the use of firemen and train crew consists were submitted to arbitration in accordance with the procedures established by Sections 7 and 8 of the Railway Labor Act (45 U.S.C. §§ 157, 158), and the arbitration award was to constitute a "complete and final disposition" of the portions of the Section 6 notices raising those issues (P.L. 88-108, §§ 3, 4). The validity of the Award by Arbitration Board No. 282 was upheld in *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11 (D. D.C.,

1964), aff'd *per curiam,* 331 F.2d 1020 (D.C. Cir., 1964).

With respect to the crew-consist issue, Article III of the Award (App. F, at 74-79) did not directly modify the existing rules stipulating the consist of train crews. Rather, Article III established a procedure for modifying such rules whereby, in general, written notice could be given of proposed changes in the rules, the interested carrier and union conferred and attempted to reach agreement upon any changes to be made, and either party could submit the dispute to a special board of adjustment for final decision pursuant to "guidelines" specified in the Award if no agreement was reached. Thus, Paragraph III-A(2) provided (*id.,* at 74-75) that: "No change shall be made in the scope or application of rules in effect immediately prior to the effective date of this Award . . . which require a stipulated number of trainmen . . . in any class of road service . . . , or which require a stipulated number of brakemen or helpers in any class of yard, transfer, or belt line service . . . , except by agreement, or pursuant to the provisions of this Award." Article III also provided that trainmen in active service as of the effective date of the Award were to be retained in road or yard service until they retired, were discharged for cause or otherwise were removed from employment by natural attrition.

Section 3 of P.L. 88-108 required Board 282 to "give due consideration to those matters on which the parties were in tentative agreement," and the crew-consist provisions of the Award were largely patterned "both in matters of approach and in matters of substance" after what the parties had tentatively agreed upon in their negotiations prior to enactment of the statute. *Opinion of Neutral Members,* 41 Labor Arbitration 680, 696 (1963). There was "no substantial structure of agreement . . . concerning the proposed elimination of firemen's jobs," however, and the

Board had to develop its own approach to that issue. *Id.*, at 686. The Board considered and rejected an approach —similar to that adopted in Article III as to crew consists —whereby a procedure for modifying firemen's rules would be established as the Neutral Members were "convinced that the arbitration of disputes over the need for firemen in road freight and yard service on a case-by-case basis on each railroad, even if legally permissible, would simply not be administratively feasible." *Id.*, at 690. But the Neutral Members agreed with the Presidential Railroad Commission "that firemen-helpers are not so essential for the safe and efficient operation of road freight and yard diesels that there should continue to be either a national rule or local rules requiring their assignment on all such diesels" (*id.*, at 688), and they believed that by "allowing the firemen's organizations sole discretion to decide that firemen must be used in up to ten per cent of all crew assignments which the carrier has already concluded can be performed safely and efficiently without firemen, . . . we have provided a sufficient margin for error" (*id.*, at 691).

Accordingly, Article II of the Award (App. F, at 68-74) provided, in Paragraph A(1), that all "agreements, rules, regulations, interpretations, and practices, however established, with respect to the employment of firemen (helpers) shall continue undisturbed except as modified by the terms of this Award," and further provided, in Parts B, C and D the manner in which the prior agreements and rules were "modified by the terms of this Award." Paragraph B(1) provided for a listing by the carriers, within 7 days after the effective date of the Award, of "pool and regularly assigned freight engine crews" and "regularly assigned yard engine crews" on which, in the carrier's judgment, firemen were not needed. Paragraph B(2) authorized the union to veto 10% of the crews thus listed (within each

seniority district) within 30 days after receipt of the carriers' lists. Paragraph B(3) provided that, at three-month intervals thereafter, supplemental lists of all "pool and regularly assigned freight engine crews and of regularly assigned yard engine crews which have been established or discontinued in each seniority district during the preceding 3 months" shall be served by the carriers and for readjustment of the union's vetoes in the light of such supplemental lists. Paragraph B(4) provided that the union's general chairmen are to receive copies of the carriers' lists, and Paragraph B(5) provided that:

> "After the expiration of 37 days following the effective date of this Award, the carrier shall not be required to use firemen (helpers) on other than steam power in any class of freight service (including all mixed, miscellaneous, and unclassified services) or in any class of yard service (including all transfer, belt line, and miscellaneous yard services), other than in crews designated by the local chairman, pursuant to the provisions of paragraphs B(2) and B(3) of this Award, except as may be necessary to provide jobs for firemen (helpers) whose employment rights are retained as provided in Parts C and D of this Award; provided that no yard locomotive shall be operated without a fireman (helper) unless and until it is equipped with a deadman control in good operating condition."

On its face, therefore, Part B directly modified the National Diesel Agreement which had required the use of a fireman on all locomotives and established a new rule, commencing 37 days after the effective date of the Award, as to when firemen must be used on diesel freight and yard locomotives. Paragraph B(5) states flatly that firemen

need not be used on such locomotives, except in three situations: (1) crews vetoed by the union, (2) where necessary to provide engine-service employment to "protected" employees entitled thereto by Parts C and D of the Award; and (3) when yard engines are operated without a deadman control in good operating conditions.[3]

Parts C and D of Article II provided protections for the firemen then employed. In general, firemen who had less than two years seniority as of the effective date of the Award could be separated from employment upon the payment of substantial separation allowances, those with between two and ten years seniority could be offered comparable jobs (with five-year guarantees against any reduction in wages and the payment of relocation expenses) and separated from employment upon the payment of substantial separation allowances if they refused such job offers, and those with more than ten years seniority were to be retained in engine service until they retired, were discharged for cause or otherwise were removed from employment by natural attrition. The carriers have reduced the number of firemen employed by about 18,000, provided comparable jobs to some 1200 former firemen, paid some $36,000,000 in separation allowances, and realized savings (as of December 1, 1965) of about $179,000,000, through application of Article II of the Award (JA 132).

Part E of Article II provided for the establishment of a National Joint Board "charged with responsibility for making an extensive and continuing study of the experience

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[3] Of course, in the event (rare, if not non-existent) a carrier did not list a crew because in its judgment a fireman was needed, the carrier thereby agreed to use a fireman on that crew. But, "errors of omission" in the listing of crews could be corrected within a reasonable period, so Board 282 ruled. Answer on September 16, 1965 to BLF&E Question No. 135 (App. G hereto, at 82).

in road freight and yard service with and without the employment of firemen (helpers) during the period that this Award remains in effect," and to "issue to the parties a report based on its study" within three months of the expiration of the Award. In the Report of the National Joint Board, issued on January 5, 1966, the majority concluded that the elimination of firemen had not resulted in an undue work burden on other employees (p. 18-33); that the earnings of firemen retained in employment generally had increased and instances of actual hardship upon individual firemen as a result of application of the Award were rare (pp. 34-63); and that the elimination of firemen had not adversely affected safety of operations (pp. 64-102) or efficiency of operations (pp. 103-120).

Section 4 of P.L. 88-108 provided that Award 282 "shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise." Article IV of the Award (App. F, at 79) provided that the "Award shall continue in force for two years from the date it takes effect, unless the parties agree otherwise." March 30, 1966 was the last day of that two-year period insofar as the firemen's provisions of the Award are concerned (JA 67, 74). Shortly prior to that date, petitioners filed their complaint for a declaratory judgment and injunctive relief (JA 43-73). The jurisdiction of the District Court was grounded upon 28 U.S.C. §§ 1331, 1337, 2201 and 2202. On March 28, 1966, petitioners obtained a temporary restraining order against strikes by respondent over any dispute as to the rules to be applied after expiration of the Award (JA 96-97), but respondent nonetheless struck 12 of the railroads, including some of the largest, in the early morning hours of March 31, 1966, which strikes were specifically enjoined by a supplement to the temporary restraining order (JA 98-100).

On or about November 15, 1965, respondent served most of petitioners, under Section 6 of the Railway Labor Act, with a notice relating to the subject matter of the Award. That notice was divided into three parts, identified as "Notice No. 1," "Notice No. 2," and "Notice No. 3", and requested that the proposals made therein be adopted effective upon the expiration of the Award. Petitioners took the position that those notices were premature, because served prior to expiration of the Award, and were otherwise invalid. JA 132-134, 144-166.

In its judgment entered on May 12, 1966 (JA 231-237), the District Court ruled, among other things, that: (1) petitioners could not terminate the employment of firemen or offer comparable jobs thereto under Part II-C of the Award after the expiration of the Award; (2) with that exception, the agreements and rules in effect prior to the Award were not restored upon expiration of the Award, and the modifications in such agreements and rules made by or pursuant to the Award (including the provisions for protection of existing employees) continued to apply until changed in accordance with the Railway Labor Act; and (3) the notices served by respondent under Section 6 of the Railway Labor Act were premature and could not become effective until the day after the expiration of the Award. The judgment enjoined respondent from striking petitioners over, in general, actions or refusals to act which were authorized by the judgment.

Both sides appealed. The Court of Appeals reversed the first and third of those rulings.[4] With respect to the

[4] The position of the Court of Appeals with respect to the first ruling is not entirely clear. In footnote 2 to its supplemental opinion, the court stated (App. C, at 56) that the "work rules effectuating the changes made under the Award included the ancillary protective provisions of Part II-C for individuals transferred or separated in implementing the change" and that those "work rules continued in effect after the Award." Since Part C of Article II contains the provisions permitting certain firemen to be

second ruling described above, the Court of Appeals agreed in principle with the views of the District Court. But, it concluded that the provisions in Part B of Article II of the Award established procedures for modifying the prior rules and agreements, rather than in themselves modifying such rules and agreements, and that such procedures could not be utilized after expiration of the Award. In consequence, the Court of Appeals held that the prior rules and agreements applied so as to require the use of firemen on "new runs" created after expiration of the Award and in states where valid "full crew" laws requiring the use of a fireman on each locomotive were repealed after expiration of the Award.

The interpretation of the Award by the court below as establishing a procedure for modifying the prior agreements and rules, rather than directly modifying those agreements and establishing new rules governing the use of firemen, not only is contrary to the plain language of the Award, but had not been suggested by respondent [5] or

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separated from employment or offered comparable jobs, the court thus seems to have held that the District Court erred in holding that petitioners could not implement those provisions after expiration of the Award. An ambiguity was created, however, by another statement in the supplemental opinion by the Court of Appeals (App. C, at 55) that "a carrier is not only prevented from taking "affirmative acts" under the Award to reduce the use of firemen, as the District Court properly held, but . . . ." The District Court had grounded its ruling that Part C could not be implemented after expiration of the Award upon the "affirmative acts" theory referred to by the Court of Appeals. In their petition for rehearing and clarification, the carriers pointed out this ambiguity and their reasons for believing that the Court of Appeals intended to hold that the District Court erred. Since the Court of Appeals did not clarify the matter (see App. E, at 64-65), it apparently agreed with petitioners' interpretation of its supplemental opinion.

[5] Indeed, in another case pending in the Court of Appeals at the same time, respondent was contending that the operation of a locomotive without a fireman in a situation where the carrier had inadvertently failed to list the crew under Paragraph B(3) of the Award constituted a violation of the Award, rather than the National Diesel Agreement, and that, conse-

anyone else and is inconsistent with interpretations by Board 282 of its Award. Moreover, Board 282 had ruled that crews in "full-crew law states" were subject to the "listing" and "vetoing" provisions of the Award, which actions would have established new "work rules" that continue after expiration of the Award even under the principles stated by the Court of Appeals. And, as that court had previously held, disputed issues as to the meaning of the Award were for Board 282 rather than the courts to decide. See pp. 27-36, *infra*.

These and other pertinent considerations were brought to the attention of the Court of Appeals by petitioners in their petition for a rehearing and for clarification. That petition was denied, "without prejudice, however, to the Board's [Arbitration Board No. 282] seeking leave within thirty days from the date of this order to submit as amicus curiae a showing of respects, if any there be, in which the opinions of this court are inconsistent with the understanding of Board 282 as to the proper meaning and applicability of its award" (App. E, at 64-65). In addition the Court modified its prior supplemental opinion to hold that the listing of crews in "full-crew" law states was "conditional" so as to modify the National Diesel Agreement only if such laws were repealed during the period of the

quently, neither Section 3 of the Railway Labor Act (45 U.S.C. § 153) nor the claims-and-grievance procedure established by the parties were applicable to individual claims growing out of such a violation. *Southern Pacific Company* v. *Brotherhood of Locomotive Firemen and Enginemen*, No. 20,378. The carrier agreed in that case that a violation of the Award was involved, and urged that Section 3 and the claims-and-grievance procedure applied nevertheless. But, of course, if the National Diesel Agreement is modified only by the carriers' actions in listing crews under Paragraphs B(1) and B(3), rather than by the Award itself, the failure to use a fireman on an unlisted crew would violate the National Diesel Agreement rather than the Award. Nevertheless, in an opinion in that case issued on October 6, 1967 (56 CCH Labor Cases ¶ 12,209), the Court of Appeals held that violations of the Award were involved, without mentioning its inconsistent opinion in this case. A petition for rehearing is pending.

Award (App. E, at 65). On October 19, 1967, Board 282 advised the Clerk of the Court of Appeals (over the dissent of its carrier members) that:

> "Exercising the discretion granted by the U.S. Court of Appeals for the D.C. Circuit in its memorandum of September 21, 1967, in Cases No. 20192, 20193, 20215, and 20216, Arbitration Board 282 respectfully declines to submit any statement concerning whether the opinions of the Court are either consistent or inconsistent with the understanding of Board 282 as to the proper meaning and applicability of its Award."

Thus, the Board did not consider whether or not it agreed with the Court's interpretation of the Award, and simply declined to request leave to make an *amicus* submission in that regard. In view of that refusal, the carriers immediately submitted questions to Board 282 raising the disputed issues as to the interpretation of the Award, as the Board has no "discretion" to refuse to answer questions of interpretation put to it by the parties, which questions are now pending. The carriers also moved the Court of Appeals to vacate its denial of their petition for rehearing and to stay the proceedings pending Board 282's answer to those questions, which motion was denied on November 9, 1967.

Reasons for Granting the Writ

In P.L. 88-108, the Congress provided for arbitration of the firemen and crew-consist issues raised by the 1959 and 1960 Section 6 notices in accordance with the provisions of the Railway Labor Act. One must look to the Railway Labor Act, therefore, to determine the consequences of the expiration of the two-year period in which the arbitration award remained in effect. This generally

was recognized by the court below and it correctly held that the modifications in substantive work rules made by or pursuant to Award 282 continued to apply after the expiration of the two-year period by virtue of the Railway Labor Act until changed in accordance with that Act. But that court erred in holding that the National Diesel Agreement, which was modified by the Award, nevertheless applies to all "new runs" created after expiration of the Award and in states where valid "full crew" laws are repealed after expiration of the Award, so as to require the use of a fireman on all such "new runs" and on all locomotives in such states.

In reaching that erroneous result, the court not only misinterpreted the plain language of the Award, but also ignored the established rule that disputed issues as to the meaning of arbitration awards under the Railway Labor Act are for the arbitration board rather than the courts to decide and failed to recognize that, even if the Award were correctly interpreted as establishing procedures for changing prior agreements and rules governing the employment of firemen, such procedures continue by virtue of the Railway Labor Act until changed in accordance with that Act. In addition, the court erred in holding that the carriers were required to bargain prior to the expiration of the Award upon Section 6 notices relating to the subject matter of the Award, and thus in failing to recognize that under the Railway Labor Act the effect of an expiration date in a collective bargaining agreement or arbitration award is to establish a moratorium during which the parties cannot be required to bargain about proposed changes in such an agreement or award.

These erroneous rulings will require the use of firemen in situations where the Presidential Railroad Commission, Emergency Board No. 154 and Arbitration Board No. 282 all concluded that firemen were not needed, and thus are important to the general public as well as to the parties

since the unnecessarily increased operating costs to the railroads—which already are financially hard pressed—will eventually affect the rates charged for rail transportation. And, the issues presented are important to the administration of the Railway Labor Act and conflict in principle with decisions by this Court and other courts. Consequently, we believe that the rulings below with respect to those issues deserve review by this Court.

A. *The Congress Adopted the Provisions of the Railway Labor Act in P.L. 88-108, and that Act Governs the Situation Following the Expiration of Award 282.*

As we briefly demonstrate below, the Congress integrated its disposition of the fireman and crew-consist disputes arising out of the 1959 and 1960 Section 6 notices into the normal processes of the Railway Labor Act by providing for arbitration of those issues in accordance with the arbitration provisions of that Act. Hence, a determination of the effects of the expiration of the two-year period of the Award by Arbitration Board No. 282 basically involves an interpretation of the Railway Labor Act.

When a nationwide railroad strike was threatened following exhaustion of the procedures of the Railway Labor Act with respect to the Section 6 notices served in 1959 and 1960 (see pp. 4-5, *supra*), the President urged that the Congress act to prevent such a disaster and his Administration submitted a bill (H.J. Res. 565 and S.J. Res. 102, 88th Cong., 1st Sess.) for that purpose. The Administration's bill provided for regulation by the Interstate Commerce Commission of all the issues raised by the 1959 and 1960 Section 6 notices, through interim rules that would "remain operative until the parties reach agreement regarding the matter involved, or if no agreement is reached, for two years following the date the interim rule goes into

effect." The bill did not provide for disposition of the Section 6 notices. Rather, it provided for "continued collective bargaining" upon those notices and that, if no agreement was reached prior to expiration of the I.C.C. rules, the President should report to the Congress "and make such further recommendations, if any, as he deems appropriate, including his recommendation as to whether this joint resolution should be extended."[6]

Under the Administration's bill, therefore, the parties would have been required to continue bargaining upon the 1959 and 1960 Section 6 notices during the period of I.C.C. regulation; if no agreement disposing of the dispute was reached in that bargaining, the Section 6 notices would remain outstanding and the parties once again would be free to engage in self help upon expiration of the I.C.C. regulations unless additional legislation was enacted. This was confirmed by testimony in the committee hearings (which were exclusively devoted to the Administration's bill) by the Secretary of Labor and others. The Secretary acknowledged, however, that a nationwide railroad strike would be as intolerable at the later time when the I.C.C. regulations expired as it was then and believed that the President would recommend an extension of the legislation when he reported to the Congress as required by the Administration's bill, if the parties did not dispose of the dispute by agreement. See, *e.g.*, House Hearings, at 55-56, 59-60, 64-65, 69, 81, 107, 109, 114, 565; Senate Hearings, at 49-51, 54-56, 61, 63, 81, 364, 370-371, 375.

The congressional committees, however, were not satis-

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[6] The Administration's bill is set forth in the Hearings on H.J. Res. 565 before the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess. (hereinafter referred to as "House Hearings") at 1-3, and in the Hearings on S.J. Res. 102 before the Senate Committee on Commerce, 88th Cong., 1st Sess. (hereinafter referred to as "Senate Hearings"), at 1-3.

fied with the Administration's bill. They did not share the Administration's optimism that an agreement disposing of the dispute would be reached during the period of I.C.C. regulation, and they believed (S. Rept. No. 459, 88th Cong., 1st Sess., at 10) that:

> "A failure to provide for a complete solution which would terminate the dispute at this time might well result in the necessity for a resumption of Congressional activity in a few months time. The committee has sought to avoid this possibility, both because of its distaste for legislating solutions to labor-management disputes and because of the obvious dangers of repeated congressional intervention in this field."

Accordingly, the committees revised the bill so as to "adopt the time-tested provisions of the Railway Labor Act" (*id.*, at 3) in disposing of the key issues in dispute, and it was the bill as thus revised which was enacted by the Congress.

Thus, P.L. 88-108 did not provide for I.C.C. regulation, but (§ 4) for arbitration of the crew-consist and firemen issues which "shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act" to the extent possible, with the arbitration award being "made and filed as provided in said sections and . . . subject to section 9 of said Act." Under Sections 7 and 8 of the Railway Labor Act, the parties by agreement may submit labor disputes to binding arbitration. 45 U.S.C. §§ 157, 158. In the preamble to P.L. 88-108, the Congress noted that the parties had agreed in principle to arbitration of the disputes arising out of the 1959 and 1960 Section 6 notices, but had been "unable to agree upon the terms and procedures of an arbitration agreement." In effect, therefore, the Congress wrote an arbitration agreement for the parties. See *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B. & Q. R. Co.*,

225 F. Supp. 11, 18 (D. D.C., 1964), aff'd *per curiam*, 331 F.2d 1020 (D.C. Cir., 1964). In addition, P.L. 88-108 omitted the requirement in the Administration's bill for continued collective bargaining upon the crew-consist and firemen aspects of the 1959 and 1960 Section 6 notices,[7] and provided instead (§ 3) that the award by the arbitration board would constitute a "complete and final disposition" of those aspects of the Section 6 notices.[8]

By thus adopting the "time-tested provisions of the Railway Labor Act, the Congress must have intended that the situation following the expiration of the two-year period of Award 282 should be the same as that which follows the expiration of a collective bargaining agreement or arbitration award arrived at under the Railway Labor Act. As the floor manager (Representative Harris) of the legislation explained in the House debates: "The resolution provides that on the two major issues, the order of the arbitration board would be in force for a period of 2 years. Then the issues go back under the regular established procedure of collective bargaining." 109 Cong. Rec. 16128; see, also, *id.*, at 16130. Of course, the "regular established procedure of collective bargaining" in the railroad industry is provided by the Railway Labor Act. This principle was recognized by the court below, which stated, among other things, that (App. B, at 27): "In essence

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[7] Section 6 of P.L. 88-108 provided for a resumption of collective bargaining upon the aspects of the Section 6 notices other than those raising the firemen and crew-consist issues, and they were disposed of by an agreement entered into on June 25, 1964 (JA 65, 74).

[8] In thus disposing of the Section 6 notices, the Congress avoided the situation which would have existed under the Administration's bill following the expiration of the I.C.C. regulations whereby those notices would have remained outstanding (unless disposed of by agreement) so as to permit the parties to engage in self help with respect thereto. Hence, no one contends that upon expiration of Award 282 the carriers could implement their 1959 Section 6 notices or that the unions could strike to coerce acceptance of the proposals in their 1960 Section 6 notices.

then we have a mechanism tantamount to an arbitration agreement, albeit one drafted by Congress, that confers on the arbitrator the power to impose a settlement binding for up to two years. It becomes appropriate, then, to consider what would have been the rights and duties of the parties if they had themselves written the arbitration agreement."

B. *Under the Railway Labor Act, the Rights and Duties of the Parties to A Collective Bargaining Agreement or Arbitration Award Continue after Its Expiration Date until Changed in Accordance with the Act.*

While the Railway Labor Act does not require agreement upon proposed changes in rates of pay, rules or working conditions, it provides procedures that "are purposefully long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238, 246 (1966). The Act thereby provides "a framework for peaceful settlement of labor disputes between carriers and their employees to 'insure to the public continuity and efficiency of interstate transportation service, and to protect the public from the injuries and losses consequent upon any impairment or interruption of interstate commerce through failures of managers and employees to settle peaceably their controversies.' H.R. Rep. No. 328, 69th Cong., 1st Sess., p. 1." *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, 609 (1959).

The keystone of the procedures thus established is the requirement in Section 6 that a carrier or union "shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions. . . ." It is the service of such a notice which calls into play the further requirements for conferences,

mediation by the National Mediation Board, a proffer of voluntary arbitration, and, in the President's discretion, an investigation by an emergency board. 45 U.S.C. §§ 155-160. The disputes thus created are settled either by a new collective bargaining agreement or by an agreement to submit the dispute to binding arbitration under Sections 7 and 8 of the Act. If either party subsequently desires to change the new agreement or the arbitration award pursuant to the arbitration agreement, the procedures required by the Act must be reinstituted through the service of another Section 6 notice.

Obviously, the parties should not be permitted to short circuit this statutory procedure and put themselves into a position to strike or engage in other self help without exhausting that procedure, merely by providing in a collective bargaining agreement or arbitration award that it shall terminate on a specified date. Cf., *Felter* v. *Southern Pacific Co.*, 359 U.S. 326, 336 (1959). Rather, as was held in *Manning* v. *American Airlines, Inc.*, 329 F.2d 32, 34 (2d Cir., 1964), the "effect of § 6 is to prolong agreements subject to its provisions regardless of what they say as to termination," until they are changed pursuant to new Section 6 notices and the other procedures required by the Act. See, also, *United Indus. Wkrs. of Seafarers, Etc.* v. *Board of Trustees*, 351 F.2d 183, 190, fn. 26 (5th Cir., 1965).

This basic principle was recognized by the court below. In its initial opinion, that court rejected the unions' contention that the rules and agreements in effect prior to Award 282 automatically were restored upon expiration of the Award, because (App. B, at 22-23):

> "We think the mere limitation of the effective period of the Award neither implies nor compels the construction the unions seek. Our ruling is that the work rules created by the Award constituted a new

plateau that was not automatically eroded when the Award expired. The legal underpinning for our ruling is not the Joint Resolution, which expired after 180 days of life—except insofar as necessary to sanction the Award. The ruling is not based on the Award, which had only a 2-year life, or on any agreement of the parties. The predicate of our ruling is, simply, the force of the Railway Labor Act. Certain work rules were in force on [the day the Award expired]. The mandate of the Railway Labor Act requires that the work rules in effect on any particular day shall also be in effect the following day—beyond the power of either party to institute a unilateral modification —subject to change only in accordance with the procedures prescribed by the Act. These procedures begin with the notices required by Section 6 to be served by any party seeking a change at least thirty days in advance of the proposed effective date of such change. This new-plateau reasoning applies even though the work rules are established by agreements of limited duration. 'The effect of § 6 is to prolong agreements subject to its provisions regardless of what they say as to termination.' [Citing *Manning* v. *American Airlines, Inc.*, 329 F.2d 32, 34 (2d Cir., 1964.] It likewise applies even though the work rules are established by an arbitration award of limited duration."

This ruling was clearly correct insofar as it held that the rules established by or pursuant to Award 282 continued to apply after expiration of the Award, by "force of the Railway Labor Act," until changed in accordance with that Act. But the Court's use of the term "work rules" gave some reason to believe that the court had a mistaken impression of the scope of Section 6 which applies

not just to changes in "rules," but to changes in "agreements affecting . . . rules. . . ." Unlike the situation with respect to the crew-consist provisions of the Award which everyone recognized as establishing a procedure for changing the prior crew-consist agreements and rules,[9] such a mistake did not appear to be of any significance insofar as the firemen's provisions of the Award are concerned; those provisions on their face directly established new rules governing the employment of firemen and no one had contended that they merely established a procedure for modifying the prior agreements and rules (see pp. 7-9, 12-13, *supra*).[10]

In its supplemental opinion, the court below reaffirmed its view that (App. C, at 52-53) "the work rules resulting from the Award . . . endure, by virtue of the Railway Labor Act; they are deemed to be incorporated into the prior agreements of the parties that themselves endure by virtue of the Railway Labor Act unless and until changed in accordance with that statute." But that court not only went on to hold that the procedures established by the crew-consist provisions of the Award for changing prior crew-consist agreements and rules could not be utilized after expiration of the Award, it also unexpectedly concluded that Part II-B of the Award, providing for the listing and vetoing of regular firemen's assignments and the circumstances in which firemen must be used by the carriers,

[9] See the petition for writ of certiorari now pending in this Court as No. 863.

[10] In its initial opinion (App. B, at 44), the court below directed the parties "to submit within 10 days a proposed judgment" at which time they also could "request supplemental rulings on any matters that have not been discussed in this opinion." The Court's supplemental opinion followed those submissions. None of the parties, in their respective submissions, contended that Part II-B of the Award established a procedure for modifying the National Diesel Agreement rather than directly modifying that Agreement and establishing new work rules governing the use of firemen.

should be interpreted as establishing "procedures for establishing new work rules" which "procedures, like the procedures for changing substantive work rules for crew consists of trainmen, had no effectiveness after the expiration of the Award" (App. C, at 54-55). Although recognizing "that it may be turning back the clock to an era that two presidential boards and the Neutral Members of Board 282 have agreed is technologically outdated," by reason of that conclusion the court saw "no alternative to holding that any new runs created after Award 282 are subject to the National Diesel Agreement, and its requirement of a fireman on each engine crew" (App. C, at 56). And, the court further held, upon the basis of that conclusion, that the National Diesel Agreement would apply to require the use of a fireman on all locomotives in states where valid "full crew" laws are repealed after expiration of the Award because such repeals would occur "after expiration of the power of a carrier to invoke the procedures of the Award" (App. C, at 57).

We will show (pp. 27-36, *infra*) that the court below erred in interpreting Part II-B of the Award as establishing a procedure for changing the National Diesel Agreement and other prior agreements and rules governing the use of firemen, rather than as directly establishing new rules. But even if that interpretation is correct, the court erred in its holdings based thereon because of its misconstruction of the scope of Section 6 of the Railway Labor Act. Section 6 applies to "intended changes in *agreements affecting* rates of pay, *rules*, or working conditions" (emphasis added), and not merely to intended changes *in* rates of pay, rules, or working conditions. We think it obvious that a collective bargaining agreement (including an arbitration award pursuant to an agreement to arbitrate, to which Award 282 is equivalent) establishing a

procedure for changing rules governing the use of firemen or other substantive "work rules" is one "affecting . . . rules," which can only be changed pursuant to Section 6.

We do not know of any other decision that has limited Section 6 to changes in substantive "work rules" (or substantive "rates of pay" and "working conditions") or even suggested that Section 6 should be so limited. Indeed, the *Manning* case which was relied upon by the court below did not involve a substantive "work rule," rate of pay or working condition, but a provision in an agreement establishing a procedure for the check-off of union dues, and the Second Circuit in that case held that the "effect of § 6 is to prolong *agreements* subject to its provisions regardless of what they say as to termination" (emphasis added). 329 F.2d, at 34. Conversely, where an agreement or arbitration award provides a procedure for changing existing rules, rates of pay or working conditions, such changes may be made pursuant to that procedure without resort to Section 6 and the other procedures established by the Act. Thus, in *Westchester Lodge 2186, Etc.* v. *Railway Express Agency, Inc.*, 329 F.2d 748 (2d Cir., 1964), the court rejected a contention that the *status quo* provisions of Section 6 applied to a dispute over the transfer of certain employees from one seniority district to another. This was so because the collective bargaining agreement established a procedure whereby such transfers could be brought about through "conference and agreement between the management and the duly accredited representatives of the employees," and the carrier contended that the transfers had been authorized pursuant to that procedure. As the court pointed out, "an agreement made pursuant to a specific contract provision designed to cover the situation cannot fairly be termed an alteration of the collective agreement" so as to be subject to Section 6.

Id., at 752. And see, *e.g.*, *St. Louis S. F. & T. Ry. Co.* v. *Railroad Yardmasters of America*, 328 F.2d 749, 752-753 (5th Cir., 1964).

Issues as to the scope of Section 6 perhaps most often arise in the context of a contention that a proposal in a Section 6 notice is not mandatorily bargainable because it does not affect rates of pay, rules or working conditions within the meaning of that Section. Such an issue was dealt with by the court below, in an aspect of its initial opinion which dealt with the Section 6 notices served by respondent. The court there noted that the "scope of bargainability" under Section 6 "is extremely broad." App. B, at 36. The opinion of this Court in *Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330 (1960), was relied upon for that proposition. In the *Telegraphers* case, this Court upheld the bargainability of a Section 6 notice proposing that no position in existence on a specified date "will be abolished or discontinued except by agreement between the carriers and the organization" (*id.*, at 332) —thus proposing to establish a "procedure" for negotiating outside the processes of the Railway Labor Act concerning the abolition of such positions. See also, *Railway Clerks* v. *Florida E.C.R. Co.*, *supra* at 243, where this Court held that a Section 6 notice of a proposal to require six-months advance notice of layoffs and job eliminations created a major dispute under Section 6 of the Railway Labor Act and thus, in effect, that such a proposal is bargainable.

Thus, the mere fact that a Section 6 notice or an existing agreement contains provisions establishing procedures for "notices and negotiations" (App. C, at 55) does not prevent it from "affecting rates of pay, rules, or working conditions" within the meaning of Section 6 of the Railway Labor Act. Under that Act, as under the

Labor-Management Relations Act, "[w]hether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table. . . ." *Labor Board* v. *American Ins. Co.*, 343 U.S. 395, 409 (1952). In *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963), this Court upheld the validity and bargainability under Section 6 of the November 1959 notices served by the carriers. Under the proposals made in those notices, the employment of firemen in diesel freight and yard service would have been left entirely to the discretion of the carriers. We think it inconceivable that the Court would have held those notices to be non-bargainable if they had proposed, instead, that the discretion of the carriers in that regard be subject to a 10% veto by the union in the manner provided by Part II-B of the Award. Yet, the logic of the ruling below that such "procedures" are not continued by the force of Section 6 until changed in accordance with the Act would demand a ruling that a Section 6 notice proposing to establish such "procedures" is not mandatorily bargainable.[11]

C. *Under the Railway Labor Act, Disputes as to the Meaning or Application of an Arbitration Award Are for the Arbitration Board to Decide.*

Section 8(m) of the Railway Labor Act provides that "any difference arising as to the meaning, or the application of the provisions, of an award made by a board of

[11] The court below relied in part (App. C, at 54) upon the proposition that: "The history of labor relations agreements in this industry reveals that the manning work rules were expressed in terms of ultimate results, like one-conductor-and-three-brakemen, or firemen-required-on-all-freight-locomotives, and were not not formulated in terms of a methodological approach." No authority was cited for that statement, and it is factually erroneous if not limited to the precise rules referred to therein. But how-

arbitration shall be referred back for a ruling to the same board . . ." and that such ruling ". . . shall be a part of and shall have the same force and effect as [the] original award." 45 U.S.C. §158(m); see, also, 45 U.S.C. §§ 155 Third (d) and 157 Third (c). In accordance with the plain language of this statutory provision, it has long been held that disputes over the interpretation of an arbitration award made pursuant to the Act are for the arbitration board, rather than the courts, to decide. *Order of Railroad Telegraphers* v. *New York Central R. Co.*, 181 F.2d 114, 115-116 (2d Cir., 1950); *Western Air Lines* v. *Labor Commissioner*, 167 F.2d 566 (9th Cir., 1948). The rulings by an arbitration board upon such disputes are subject to impeachment by the courts, pursuant to a petition to impeach such rulings filed under Section 9 Second of the Act (45 U.S.C. § 159 Second) within the time allowed therein, if the interpretation given to the original award is so unreasonable as to constitute a new award. *Order of Railroad Telegraphers* v. *New York Central R. Co., supra* at 117; *Mid-Continent Airlines* v. *Brotherhood of Railway, Etc.*, 83 F. Supp. 976 (W.D. Mo., 1949). Otherwise, such rulings become a part of the award, as provided in Section 8(m), and are "final and conclusive on the parties," as is provided in Section 9 Second.

Heretofore, the above-stated principles uniformly have

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ever that may be, virtually the same argument was unsuccessfully urged by the unions in the *B. & O.* case in support of their contention that the November 1959 notices were invalid and non-bargainable. In that case, the unions argued that if the carriers put those notices into effect "there will be no rules concerning the assignment of employees • • • the minimum number of such assignments to a train or engine, and the classification of such assignments, • • • notwithstanding that for many years it has been the custom, practice, and usage for the collective bargaining agreements • • • to contain such rules • • •." See 310 F. 2d 503, 509 (7th Cir., 1962), aff'd, 372 U.S. 284 (1963), where the unions' complaint is so quoted.

been applied to disputes over the meaning or application of Award 282, in view of the adoption by P.L. 88-108 of the provisions of the Railway Labor Act. *Brotherhood of R. Trainmen* v. *St. Louis Southwestern Ry. Co.*, 380 F.2d 603 (D.C. Cir., 1967); *Brotherhood of Rail. Trainmen* v. *Chicago, M., St. P. & P. R. Co.*, 380 F. 2d 605 (D.C. Cir., 1967); *New York C. & St. L. R. Co.* v. *Brotherhood of Loc. Fire. & Eng.*, 358 F.2d 464 (6th Cir., 1966); *Brotherhood of Railroad Trainmen* v. *Certain Carriers, Etc.*, 349 F.2d 207 (D.C. Cir., 1965); *Brotherhood of Railroad Train.* v. *Chicago, M., St. P. & P. R. Co.*, 345 F.2d 985 (D.C. Cir., 1965). The exclusive jurisdiction of Board 282 to interpret its Award continues to exist after expiration of the Award. *Brotherhood of Rail. Train.* v. *Terminal R. Ass'n of St. L.*, 380 F.2d 584 (D.C. Cir., 1967); *New York C. & St. L. R. Co.* v. *Brotherhood of Loc. Fire. & Eng., supra.*

Petitioners vigorously dispute the interpretation given by the court below to Part II-B of the Award, as establishing a procedure for modifying the prior agreements and rules governing the employment of firemen, rather than as directly modifying those prior agreements and rules so as to establish new rules in that regard. Indeed, we believe that the language of the Award, both as originally issued and as supplemented by rulings of Board 282, is so plain that there cannot be any *bona fide* doubt about the erroneous nature of the court's interpretation. As we have noted, that interpretation was not urged by respondent until made by the court below in its supplemental opinion. Prior to that supplemental opinion, no one had doubted the fact that the firemen's provisions of the Award established new rules governing the employment of firemen, just as no one had doubted the fact that the crew-consist provisions of the Award did establish

procedures for changing the prior crew-consist rules and agreements.[12]

This difference between the two divisions of the Award is apparent from their language and structure. See pp. 6-9, *supra.* Unlike Article III, which provided that no "change" was to be made in the prior crew-consist rules "except by agreement, or pursuant to the provisions of this Award," Article II, in Paragraph A(1), provided that the prior agreements and rules "with respect to the employment of firemen (helpers) shall continue undisturbed *except as modified by the terms of this Award.*" (Emphasis added.) Thus, by the express language of the Award, it is the "terms of this Award," and not the actions taken pursuant to those terms, which modified the National Diesel Agreement and other inconsistent prior agreements and rules respecting the employment of firemen. While Article III provides for a board of adjustment to determine the changes to be made in prior crew-consist rules when the parties are unable to agree, Article II, in Paragraph B(5), itself specifies the circumstances in which firemen are to be used on diesel freight and yard crews commencing 37 days after the effective date of the Award.

The Court of Appeals relied heavily (App. C, at 53-54) upon statements in the *Opinion of Neutral Members,* 41 Labor Arbitration 680 (1963), describing the provisions for the listing and vetoing of firemen's assignments as

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[12] See pp. 12-13 *supra.* This understanding has existed from the beginning. For example, while the unions sought to impeach the Award on the ground that Article III, in establishing procedures for changing crew-consist rules rather than itself specifying such rules, failed to make a "complete and final disposition" of the crew-consist issue as required by P.L. 88-108, no such contention was made with respect to the firemen's provisions of the Award. *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B. & Q. R. Co.,* 225 F. Supp. 11, 20 (D. D.C., 1964), aff'd *per curiam,* 331 F. 2d 1020 (D.C. Cir., 1964).

"procedures."[13] But the Neutral Members did *not* state that the procedures thus established constituted procedures for modifying the prior agreements and rules, and it seems obvious that in fact they are ancillary to the new rule established in Paragraph B(5) of Article II requiring the use of a fireman on "crews designated [*i.e.*, vetoed] by the local chairmen" of the union. As we have noted (p. 7, *supra*), the Neutral Members in their Opinion expressly considered and rejected the possibility of establishing as to the firemen issue a procedure similar to that adopted as to the crew-consist issue, and they concluded that there should not "continue to be either a national rule or local rules" requiring the use of firemen on all freight and yard locomotives.

But if the statements by the Neutral Members at the time the Award was issued do give rise to any doubt about the fact that the prior agreements and rules with respect to the employment of firemen were "modified by the terms of this Award," as is expressly stated therein, that doubt should be allayed by interpretations subsequently given to the Award by Board 282 with the concurrence of its Neutral Members. The Board has repeatedly ruled that firemen need not be used on diesel freight and yard locomotives, when not required by the Award, even though the crews in question were not subject to the listing and vetoing

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[13] We note that the Neutral Members expressly stated that the "language of the award . . . is . . . intended to govern" in the event of any conflict between that language and the statements in their Opinion. *Opinion of Neutral Members, supra* at 681. The Court of Appeals also referred to statements in the Opinion of the Neutral Members noting that the Award was to expire after two years. In noting that fact, however, the Neutral Members were not purporting to decide what rules were to apply after the Award expired. Board 282 has disclaimed any jurisdiction to decide that issue, which involves an interpretation of the Railway Labor Act and P.L. 88-108 rather than an interpretation of the Award. Answer, on June 9, 1964, to SUNA Question No. III (App. G, at 83).

procedures. Those rulings, which were concurred in by the Neutral Members, have not been impeached and have become part of the Award. See pp. 27-29, *supra*.

One such situation concerns crews on extra trains, which are not subject to being listed or vetoed as Paragraphs B(1) through B(4) apply only to pool and regularly assigned crews. Board 282 has ruled that a fireman need not be used on such crews, except as may be necessary to provide engine-service employment to the protected employees entitled thereto as is required by Paragraph B(5).[14] Obviously, if the National Diesel Agreement had not been modified by the Award itself, rather than by actions taken pursuant to the provisions for listing and vetoing regular crews, firemen would have been required on all such extra trains. Even more revealing are the rulings by Board 282 concerning the use of firemen on regular crews newly-established during the three-month intervals between the service of supplemental lists as provided in Paragraph B(3) of Article II. The Board interpreted its Award as not requiring the use of firemen on such crews prior to the service of the next supplemental list (and, of course, not thereafter unless vetoed), except where necessary to provide engine-service employment to protected employees entitled thereto under the Award as required by Paragraph B(5).[15] That ruling made unmistakably clear that the listing and vetoing procedures in Paragraphs B(1) through B(4) are ancillary to the new rule governing the employment of firemen established by Paragraph B(5), rather than a means of establishing a new rule modifying

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[14] *E.g.*, Answer, on May 17, 1964, to BLF&E Question No. 9; Answer, on September 16, 1964, to BLF&E Question No. 79; Answer, on September 16, 1964 to BLF&E Question No. 105—set forth in App. G, at 80-82.

[15] Answers, on May 17, 1964, to Carriers Question No. 2 under Section II—Part B(3), and to BLF&E Question No. 6(b)—set forth in App. G, at 80.

the National Diesel Agreement. Otherwise, the National Diesel Agreement would have applied to require the use of a fireman on all such newly-established crews until such time as they were listed without being vetoed.

We believe that these rulings conclusively establish that the Award itself, rather than actions taken pursuant to procedures established by the Award, modified the National Diesel Agreement and established new rules governing the employment of firemen. Furthermore, we think it entirely clear, from rulings by Board 282 as well as from the Award as originally issued, that the prior agreements and rules were modified in states having valid so-called "full crew" laws to the same extent and in the same manner as they were modified in all other states.

In *Engineers* v. *Chicago, R. I. & P. R. Co.*, 382 U.S. 423 (1966), this Court held that P.L. 88-108 and Award 282 did not pre-empt state "full crew" laws, and that the Arkansas law there involved would, unless otherwise unconstitutional,[16] have to be obeyed even though inconsistent with the Award, just as it had to be obeyed even though inconsistent with a collective bargaining agreement. See, *e.g., Missouri Pacific R. Co.* v. *Norwood*, 283 U.S. 249 (1931). There was no issue in that case as to whether the National Diesel Agreement was or could be modified in "full crew" law states either by or pursuant to the Award and this Court, of course, did not rule upon any such issue. Indeed, it had already been conclusively established that the Award did modify the prior agreements and rules in such states as well as in all other states.

This was indicated by the fact that the Award as

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[16] Following the remand by this Court, the three-judge District Court held that the Arkansas law is unconstitutional under the Due Process Clause in the Fourteenth Amendment and the Commerce Clause in Article I, Section 8 of the Constitution. Opinion and Decree of October 2, 1967 in Civil No. H.S. 944 (W.D. Ark.).

originally issued did not contain any exception for states having valid "full crew" laws, and was definitely settled by Board 282 in its Answer, on May 17, 1964, to Carriers' Question No. 5 under Section II—Part B(1) and B(2), as follows: "The obligations and rights of the parties with respect to the listing of jobs and the exercise of the veto under Section II, Parts B(1), B(2), B(3) and B(4) of the Award are the same in the so-called 'full crew law states' as in all other states." See App. G, at 83-84. That interpretation of the Award was not impeached, and thus became a part of the Award and "final and conclusive" on the parties thereto. See pp. 27-28, *supra*.

Under the Award as thus definitively interpreted, the National Diesel Agreement was modified even if the Award merely established a procedure for modifying that Agreement. The parties stipulated (JA 130) that some carriers had listed crews under Paragraphs B(1) and B(3) during the period of the Award in "full crew" law states, and the court below held in its supplemental opinion that when crews were listed without being vetoed a new "work rule" was established which (App. C, at 56) "does not require a fireman on that crew even though for one reason or another the carrier had not removed or transferred that fireman by the end of the effective period of the Award." When this was pointed out to the court in the carriers' petition for rehearing and for clarification, however, the court amended its supplemental opinion to state (App. E, at 65) that:

> "The Board authorized the carriers to list jobs for blanking, and thus provide a classification 'when and if such full crew laws are amended or repealed.' Answer of May 17, 1964, to Carriers' Question No. 5 under Section II—Part B(1) and B(2). But this conditional blanking was only available as an advance

procedure made fruitful if the necessary condition materialized during the 2-year lifetime of the Award. See *Opinion of Neutral Members,* quoted *supra,* 41 Lab. Arb. at 681. . . ."

We submit that there is no basis whatsoever in the Answer to Carriers' Question No. 5 for the view that the modifications of the prior rules and agreements were intended by Board 282 to be "conditional" upon repeal of the "full crew" law within the two-year period of the Award. And, the statement by the Neutral Members cited by the court below provides no basis for such an interpretation.[17]

In short, we believe that the court's interpretations of the Award are inconsistent with the language of the Award as originally written and as interpreted by Board 282. Plainly, the court's interpretations are not so obviously correct as to be beyond *bona fide* dispute. Those interpretations are disputed by petitioners, and, as we have shown, under the Railway Labor Act as adopted by P.L. 88-108, primary jurisdiction to resolve such disputes is in Board 282 rather than the courts. In its order denying the petition for rehearing and for clarification (App. E, at 64-65), the court appeared to recognize that its interpretations arguably "are inconsistent with the understanding of Board 282 as to the proper meaning and applicability of its award," and suggested that Board 282 might request leave to make an *amicus* submission with respect to that

[17] The reference is to the following statement: "The Board's award will remain in force only two years. Within that time the effect of attrition may be such that the number of firemen or train crew jobs actually eliminated may be comparatively small." That statement merely recognizes that the rules established by the Award may be changed under the Railway Labor Act after the expiration of the Award. Certainly, it does not differentiate between "full crew" law states and other states or suggest that modifications of the prior rules and agreements in "full crew" law states were intended to be "conditional" upon repeal of that law within the two-year period.

issue. If Board 282 had made an *amicus* submission or determined not to so do because it agreed with the court's interpretations of its Award, that procedure might have been satisfactory even though unorthodox. But when the court was informed that the Board would decline to request leave to make an *amicus* submission without considering whether it agreed with the court's interpretations of the Award, under the "discretion" given to it by the procedure adopted by the court, then the court should have stayed its proceedings pending answers by the Board to questions submitted by the parties—as petitioners requested (see p. 14, *supra*)—or adopted some other appropriate procedure for assuring that the disputed issues as to the meaning of the Award are decided by the Board rather than by the courts.

D. *Under the Railway Labor Act, the Purpose and Effect of an Expiration Date in A Collective Bargaining Agreement or Arbitration Award Is to Preclude the Parties from Being Required Under the Act to Bargain Prior to Such Expiration Date about Proposed Changes in Such Agreement or Award.*

As we have shown (pp. 20-27, *supra*), the expiration of a collective bargaining agreement or arbitration award under the Railway Labor Act does not terminate the rights and duties of the parties pursuant to such agreement or award. Thus, the purpose and effect of including an expiration date in such an agreement or award is not to terminate the rights and duties of the parties thereunder. Rather, the purpose and effect of including an expiration date is to establish a moratorium period in which the parties to the agreement or award cannot be compelled to bargain under the Railway Labor Act concerning proposed changes in the agreement or award. Such bargaining can be compelled only after the expiration date.

In *Flight Engineers' Inter. Ass'n* v. *American Airlines, Inc.*, 303 F.2d 5 (5th Cir., 1962), appeal dismissed by stipulation, 314 F.2d 500 (5th Cir. 1963), for example, the carrier and union had entered into an agreement which was to terminate five years from its effective date. On the same day, they entered into a supplemental agreement which provided that "written notice of an intended change in any provision could be served 30 days after the first anniversary of the first turbine aircraft in scheduled passenger service." *Id.*, at 7. The union served a Section 6 notice after the date specified in the supplemental agreement, but "the Carrier took the position that a number of [the union's] demands were actually covered by the terms of the basic agreement, and therefore not open for bargaining for 5 years.", *Id.*, at 7.

The trial court enjoined a strike by the union pending a determination by an adjustment board, under Section 3 of the Railway Labor Act (45 U.S.C. § 153), of whether or not the union's demands were outside the scope of the reopening clause in the supplemental agreement, and the Fifth Circuit affirmed. In so doing, the Fifth Circuit rejected a contention that the carrier could be compelled to bargain prior to the expiration of the basic agreement even if the Section 6 proposals related to matters covered by that agreement rather than by the supplemental agreement, stating (*id.*, at 13) that:

> "Again, without anticipating what the decision of the System Board of Adjustment on the merits (assuming it has jurisdiction) must be, this analysis rests on the premise that the law as such will give vitality to the duration clauses and correlative reopening clauses of labor contracts. The Union argues in effect that since no one in 1958 knew all the problems which would arise in the operation of jets, the Union could not

foreclose its statutory right—and duty—to bargain when, and as, and as often as needed. But any such rule leads either to chaos or a demolition of the concept of industrial peace through labor contracts fairly arrived at."

So, too, in *Capitol Airways, Inc.* v. *Air Line Pilots Ass'n*, 41 CCH Labor Cases ¶16,739 (MD Tenn., 1961), the carrier and union executed an agreement containing a provision that it was to expire on June 30, 1961. The plaintiff contended that this was a "valid contract" and hence that it had "no duty to bargain with the defendant" union in regard to the employees covered by the contract "until the contract expires on June 30, 1961." The court stated that if the agreement were valid it follows "necessarily that the plaintiff is not required to bargain [with the union as representative of those employees] with respect to their terms and conditions of employment until the expiration of such agreement on June 30, 1961;" held that the agreement was valid, and granted a summary judgment for the plaintiff. See, also, *Rutland Ry.* v. *Brotherhood of Loc. Eng.*, 307 F.2d 21, 36 (2d Cir., 1962), where the court stated that: "We do not say that the issue in the present case is not a bargainable one. We have no doubt that the brotherhoods, upon the expiration of the existing agreements, may require the railroad to bargain. . . ."

Insofar as we are aware, there were no decisions to the contrary prior to the decision by the court below. While that court correctly held that the carriers were not required to bargain prior to the expiration of the Award upon Section 6 notices served by one of the crew-consist unions, it erroneously held that the carriers were required to bargain prior to the expiration of the Award upon the Section 6 notices served by respondent and by another crew-consist union. App. B, at 24-34. The distinction

drawn by the court below was that the notices served by the one union proposed changes in crew-consist rules to become effective during the period of the Award, while respondent's notices proposed changes in firemen's rules to become effective the day after the expiration of the Award. Although the attempt by the one union to ignore the Award altogether undoubtedly emphasizes the impropriety of its endeavor to proceed under the Railway Labor Act during the period of the Award, we submit that the mere fact that respondent specified an effective date immediately following the expiration of the Award did not entitle it to require the carriers to bargain over its Section 6 notices prior to the expiration of the Award.

In holding to the contrary, the court below relied heavily (App. B, at 25-26) upon testimony during the hearings upon the Administration's bill to the fact that bargaining upon the 1959 and 1960 Section 6 notices would continue during the period of I.C.C. regulation as required by that bill. But, as we have shown (pp. 16-20, *supra*), the Administration's bill was revised to eliminate the requirement for such bargaining and the Congress, instead, provided in P.L. 88-108 for a "complete and final disposition" of the 1959 and 1960 notices through arbitration in accordance with the Railway Labor Act. And, as we have further demonstrated (pp. 36-38, *supra*), the purpose and effect of an expiration date in an agreement or arbitration award under the Railway Labor Act is to assure that one party cannot reopen the dispute so as to compel further bargaining under the Railway Labor Act prior to that termination date. Such a moratorium was particularly appropriate here in order to afford a substantial "cooling off" period before the dispute could be renewed and to assure that the Report of the National Joint Board evaluating the experience under the Award (see pp. 9-10,

supra) would be available for use in bargaining upon new Section 6 notices.

But for this aspect of the "time-tested provisions of the Railway Labor Act" which the Congress adopted in P.L. 88-108, the Congress could not have been assured of avoiding the possibility, which it found to be an objectionable feature of the Administration's bill (see p. 18, *supra*), of being faced with a renewed threat of a railroad strike and a consequent demand for further legislative intervention, within a relatively short time. Otherwise, the unions could have placed themselves in a position to strike immediately upon expiration of the Award by exhausting the procedures of the Railway Labor Act during the period of the Award with respect to Section 6 proposals such as those served by the BRT. Plainly, this was not intended by the Congress.

E. *The Issues Involved Are Important and Should Be Reviewed by this Court.*

We believe we have demonstrated that several aspects of the decision below are based upon constructions of the Railway Labor Act that are erroneous and that conflict in principle with views expressed by this Court or by other courts of appeals. The rulings below with respect to the scope of Section 6, the respective jurisdictions of the courts and arbitration boards to resolve disputes over the interpretation of arbitration awards, and the effect of an expiration date in a collective bargaining agreement or arbitration award are important to the administration of the Railway Labor Act in general as well as to the decision of this case.

Even as limited to this case, the aspects of the decision below which petitioners seek to have reviewed are of great importance to the parties and to the public. The Court of

Appeals recognized that its ruling that firemen must be used on "new runs" created after the expiration of Award 282 "may be turning the clock back to an era that two presidential boards and the Neutral Members have agreed is technologically outdated . . ." (App. C, at 56). The Presidential Railroad Commission, Emergency Board No. 154 and Board 282 all found, upon the basis of extensive records, that firemen were not needed on most diesel freight and yard engines. Although the carriers served their Section 6 notices proposing to eliminate any requirements for the use of firemen on such locomotives in November of 1959, it was March of 1964 before they were in a position to commence eliminating firemen from some crews. Even now, the number of firemen on freight and yard crews has not been reduced to the 10% that Board 282 considered to be more than adequate to take care of all situations in which the use of a fireman may be justified by requirements of safety or efficiency of operations, because of the necessity of providing engine-service employment to certain existing firemen until they are removed by natural attrition.

To require the carriers to use firemen on all "new runs" created since March 30, 1966 until such time as the time-consuming procedures of the Railway Labor Act once again can be exhausted (and perhaps until arbitration once more is had under a statute such as P.L. 88-108) certainly should not be required in such circumstances unless this Court finds that to have clearly been intended by the Congress. Moreover, the court below did not define what constitutes a "new run" for purposes of its decision, and that term is not defined by the Railway Labor Act, by P.L. 88-108 or by the Award. One can foresee a multitude of controversies over that issue and a flood of claims on behalf of individual firemen based upon contentions that the failure of a carrier to use a fireman on a particular

crew, even though permitted by the judgment of the District Court, was erroneous because that crew operated a "new run" within the meaning of the decision by the Court of Appeals. We submit that the clock should not be turned back in this manner without review by this Court.

Furthermore, two states—Oregon and Washington—have repealed "full crew" laws requiring the use of a fireman since the expiration of the Award,[18] and others may do so. Unless it can be shown that those statutes were unconstitutional, the decision below has the effect of continuing them in existence despite their repeal, insofar as they required the use of firemen. The clock will have been turned back not only as to "new runs" but as to all crews to which such laws applied. We should note, also, that the importance of the issues raised herein—even if limited to the immediate effect of the decision below upon the parties and the public—is enhanced by the fact that similar rulings were made with respect to some of those issues in the context of the crew-consist provisions of Award 282, which rulings also are pending before this Court on petition for writ of certiorari in No. 863. In addition, the unions have sought review of other aspects of the decision below both as to the firemen's (No. 859) and as to the crew-consist (Nos. 861 and 862) provisions of the Award. While the carriers, in responding to the unions' petitions, expect to demonstrate that the rulings adverse to the unions were clearly correct, the considerations involved are closely related to the considerations urged herein and certainly the Court should not grant the unions' petition without also granting this petition and the petition in No. 863.

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[18] Oregon Laws, 1965, Chapter 462, repealed the Oregon "full crew" law effective January 1, 1967. The Washington "full crew" law was repealed effective December 8, 1966. Laws of Washington, 1967, Chapter 2, Section 1.

Conclusion

For the reasons stated above, this petition for writ of certiorari should be granted.

Respectfully submitted,

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005
Of Counsel for Petitioners.

FRANCIS M. SHEA
RICHARD T. CONWAY
734 Fifteenth Street, N.W.
Washington, D.C. 20005

JAMES R. WOLFE
Union Station Building
Chicago, Illinois 60606
Attorneys for Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 933

BANGOR AND AROOSTOOK RAILROAD COMPANY, *et al.*, and THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*, *Petitioners*,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Respondent.*

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

INDEX

Appendix:

	Page
A—Opinion of District Court, May 9, 1966	1
B—Opinion of Court of Appeals, May 12, 1967	12
C—Opinion of Court of Appeals, July 31, 1967	49
D—Judgment of Court of Appeals, July 31, 1967	63
E—Memorandum and Order of Court of Appeals, September 21, 1967	64
F—Award by Arbitration Board No. 282	66
G—Rulings by Arbitration Board No. 282	80
H—Statutes Involved	85

APPENDIX A

OPINION

Francis M. Shea and Richard T. Conway, both of Washington, D. C., for the plaintiffs in Action No. 777-66; and for the defendants in Action No. 784-66.

Joseph L. Rauh, Jr. and Isaac N. Groner, both of Washington, D. C., for the defendant in Action No. 777-66; and for the plaintiff in Action No. 784-66.

This is the trial of two consolidated actions, one brought by a group of railroads against the Brotherhood of Locomotive Firemen and Enginemen, and the other instituted by the Brotherhood against a number of railroads. The second action had been filed originally in the United States District Court for the Northern District of Illinois, and on defendants' motion was transferred here by Chief Judge Campbell of the Illinois Federal Court. The two were then consolidated on motion of the plaintiffs in Action No. 777-66. In each action a declaratory judgment and a permanent injunction are sought and a counterclaim is interposed for reciprocal relief.

The basic issues to be determined are the effect and the consequences of the termination of the effective period of an Award of a compulsory arbitration proceeding concerning two principal issues of a nationwide controversy between Class I railroads and organizations of railway employees. The differences in dispute were the need for continued use of firemen on Diesel engines in freight and yard service, and the possibility of reduction in the size of train crews on numerous runs throughout the country. The compulsory arbitration was directed by a Joint Resolution of Congress, approved August 28, 1963, 77 Stat. 132, in order to prevent a threatened nationwide railroad strike.

It was claimed by the carriers that firemen were not needed on Diesel engines in freight and yard service, as there were no longer any fires to stoke and that whatever other help was rendered by the fireman was in fact accorded

by the head brakeman, whose post was also in the cab of the engine.[1]

The Arbitration Board, known as Board 282, reached the conclusion that firemen were no longer needed on Diesel engines in freight and yard service, except as to ten percent of the number, who it was held should be retained for unusual and extraordinary situations. In order to prevent hardship and distress to thousands of employees, however, the Award of the Board did not direct that ninety percent of the firemen in question could be discharged forthwith, but provided that the result should be accomplished only by attrition over the years, which would ease any possible financial distress to the individuals concerned and to their families. Accordingly, it was prescribed by the Award that all firemen who had at least ten years of service, should retain their status until death, retirement, resignation, or discharge for cause. The same right was extended to firemen having between two and ten years of service, with the qualification, however, that the carriers were to have the privilege of offering comparable positions to firemen in this class, for which they were qualified or could be made qualified, with a guarantee of employment in the new positions for at least five years. Any moving expenses incurred by the employees under these circumstances were to be borne by the employer. If such an offer were declined by the employee, he could be discharged upon the payment of severance pay, the size of which was dependent upon the length of his service. The employment of firemen of less than two years' service could be terminated upon the payment of severance allowances, again measured by the length of service.

In respect to the proposed reduction of sizes of crews on numerous trains, the Award formulated certain specific considerations called "guidelines," to govern the decision as to whether the size of any specific crew should be reduced.

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[1] No question was raised as to the necessity of firemen in passenger service because the railroads did not dispute the need of having two men in the cab, and in passenger service it was not customary for a brakeman to be stationed in the cab.

The issues as to particular crews were remanded to the local properties for negotiations. If negotiations did not result in an agreement, special boards of adjustment were to be created in the respective localities in order to resolve the disputes.[2]

The consolidated actions now before the Court were tried on the basis of a stipulation of facts, which the Court adopts as its findings of fact. This opinion will constitute the conclusions of law. The issues in these actions involve the provisions of the Award which relate to firemen. Similar questions affecting trainmen were determined in *Akron & Barberton Belt Railroad Co. et al.* v. *Brotherhood of Railroad Trainmen, et al.*, 250 F. Supp. 691.

The Joint Resolution of August 28, 1963 provided that the Award of the Arbitration Board was not to become effective until sixty days after it was filed. The statute further directed that the Award was to continue in force for such period as the Board should determine, but not to exceed two years from its effective date. The Board ordered in the Award that it should continue for two years from its effective date, unless the parties agreed otherwise. The expiration date of the Award was originally January 25, 1966. It was extended by agreement to March 31, 1966 as to the Brotherhood of Locomotive Firemen and Enginemen.

While the Award was in effect the railroads gradually reduced the number of firemen in their employ by about 18,000, and paid separation allowances approximating about $36,000,000 to firemen whose employment was severed. About 1200 employees accepted offers of other positions under the provisions of the Award.

As heretofore indicated the questions to be determined at this time are the rights and liabilities of the parties in respect to firemen as to rates of pay, rules, and working conditions after the expiration of the effective period of the Award. It is claimed by the union, as was also contended

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[2] The history of the controversy and the details of the arbitration and the Award were summarized in *Brotherhood of Locomotive Firemen and Enginemen* v. *Chicago, Burlington & Quincy Ry. Co.*, 225 F. Supp. 11; and in *Akron & Barberton Belt Railroad Co. et al.* v. *Brotherhood of Railroad Trainmen, et al.*, 250 F. Supp. 691.

by the Brotherhood of Railroad Trainmen in the *Akron & Barberton* case, *supra*, that upon the termination of the effective period of the Award, the *status quo* that existed prior to the Award was automatically restored. The Court rejected this contention in the *Akron & Barberton* case, and here repeats that rejection.[3] The Award and the operations under it created a new status in regard to rules and working conditions. This status may not be changed, as we explained in detail in the opinion of this Court in the *Akron* case, except by agreement or by serving notices under Section 6 of the Railway Labor Act (45 U.S.C. § 151) and exhausting, step by step, each of the remedies accorded by that statute.[4] Neither side may make changes unilaterally until the remedies under the Railway Labor Act are exhausted. No recourse may be had to self-help until that stage is reached, which means that so far as the firemen are concerned, they may not resort to a strike, and any such strike would be illegal.

Every statute must receive a reasonable and sensible construction. Any interpretation that obviously fails to effectuate the purpose and intent of the legislative body should be rejected. This doctrine applies not only to the Joint Resolution of Congress, but also to the Award of the arbitration board. The Award manifestly contemplated the eventual permanent abolition of the jobs of firemen on Diesel engines in freight and yard service, except as to ten percent of that number, but proposed that the desired result should be reached gradually by a process of attrition. It was not intended, therefore, that the steps taken during the effective period of the Award should become a nullity at the end of the two-year period. The purpose of the Congress and the effect of the Award would be entirely frustrated if the railroads were required to rehire firemen whose positions have been abolished during that interval. So, too, the

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[3] The reasons for this conclusions are summarized in detail in the *Akron* case, 250 F. Supp. 691, and need not be repeated here.

[4] The machinery provided by the Railway Labor Act for the settlement of labor disputes is also described in detail in the opinion in the *Akron* case, *supra*.

vested rights of those firemen who were accorded permanent protection by the Award, are not to be wiped out.

It is argued by counsel for the Brotherhood that since the Award is at an end, whenever any firemen dies, retires, or resigns thereafter his position should be filled by a new appointment. Such a course too would completely defeat the purpose and the meaning of the Award, for the objective of the Award was to abrogate the use of unnecessary firemen, but to accomplish this result by degrees and as far as possible in a painless manner.

On the other hand, neither side may take any further affirmative steps under the Award after its termination date. Thus, the railroads may not discharge any more firemen pursuant to the provisions of the Award. What has been accomplished under the Award remains and is not to be nullified or wiped out. The firemen with seniority of more than ten years retain a permanent status for their working life, which was granted to them by the Award. The firemen who accepted comparable jobs with a guarantee of five years' employment, retain that guaranty. On the other hand, the carriers are under no obligation to fill vacancies that had been caused by the separation of firemen from their positions, or to fill future vacancies. Those positions are permanently abolished. As heretofore stated, a new status has been created and no change may be made in that status except by agreement or by the service of notices under Section 6 of the Railway Labor Act, and recourse to the provisions of that statute.

A number of States have what are known as "full crew" laws, that require railroads operating within their borders to maintain crews of a certain specified minimum number. The Supreme Court has recently held in *Brotherhood of Locomotive Engineers* v. *Chicago, R. I. & P. R. Co.*, 382 U.S. 423, that Award 282 did not supersede these "full crew" laws. The result is that in some States, the railroads have not been able to achieve reductions in the number of firemen that they would have been permitted to make under the Award, if the "full crew" laws had not interfered. One of those States is Oregon, which has recently

repealed its full crew law effective January 1, 1967. It is argued by counsel for the carriers that after January 1, 1967, the railroads should be permitted to take advantage of the provisions of the Award to the extent of offering comparable jobs to firemen who had between two and ten years' standing, and discharging firemen of less than two years' standing. This Court disagrees. Since the effective period of the Award has expired, no affirmative steps may be taken under it. The mere fact that State statutes, as construed by the Supreme Court, have prevented the railroads in some instances from taking full advantage of the provisions of the Award, does not have the effect of prolonging or restoring their rights when the bar of the State statute is eliminated. The situation must be deemed frozen as of the close of the effective period of the Award. This is entirely different from the converse ruling that no vacancies occurring by attrition after the termination date need be filled. In other words, there is no right or duty to take any affirmative step under the Award on the part of either side after the crucial date.

As has been indicated and as this Court held in the *Akron* case, a new status was created by the Award and the activities under it. This status prevailed as of the date of the termination of the effective period of the Award. The sole and exclusive method of modifying it is either by agreement or by serving appropriate notices under Section 6 of the Railway Labor Act and going through the various steps by way of negotiations, mediation, and the other proceedings provided by the statute. In this instance, three such notices were served by the union during the effective period of the Award. As this Court held in the *Akron* case, while notices might be served during that interval, they did not become effective until the day after the termination of the effective period of the Award. In other words, neither side was under any obligation to participate in any of the proceedings accorded by the Railway Labor Act, pursuant to such notices until after March 31, 1966.

Naturally, there are certain limitations on the types of notices that may be served under Section 6 of the Act.

They must relate to issues concerning which the party that initiates them has a right to insist on negotiating. In other words, to use the terminology of the Labor law, they must involve "bargainable issues", *Elgin, J. & E. R. Co.* v. *Burley,* 325 U.S. 711, 739-740. Second, so far as Award 282 is concerned, the employees may not in the guise of serving notices under Section 6 of the Railway Labor Act, seek to abrogate or set aside the Award. It must be borne in mind that the Award is the result of a compulsory arbitration conducted under a mandate of Congress and has the stamp of judicial approval in the form of a judgment in a proceeding to impeach it. Neither a carrier, nor a union may institute proceedings, directly or indirectly, to set aside any provision of the Award, or the operations or activities that have taken place under it or the results that have been achieved. Collective bargaining must be restricted to the future and may not relate to alleged past grievances, *Elgin, J. & E. R. Co.* v. *Burley, supra.*

This discussion brings us to a consideration of the three notices served by the Brotherhood, which are involved in these actions. By stipulation the effect and validity of Notice No. 3 were withdrawn from disposition at this trial and were reserved for later consideration. The Court will, therefore, limit its decision in this respect to the first two notices. Notice No. 1, dated November 15, 1965, proposes that firemen taken from the seniority ranks of firemen shall be used on all locomotives on road and yard service, with a few enumerated exceptions. It provides further that a "job" may be operated without a fireman only when it becomes necessary to hire a fireman. Further it proposes that the carriers should hire and place on the firemen's seniority roster a sufficient number of firemen to comply with the provisions of the notice. In other words, this notice demands the restoration of firemen on those runs for which Award 282 expressly held firemen were unnecessary. Obviously, compliance with this notice would be a consent to abrogate and do away with the outcome of the arbitration.

Notice No. 2, served at the same time, goes even further. It proposes that all employees whose employment and seniority were terminated under the Award of Arbitration Board 282 should be recalled and restored to their seniority roster and employed with their original seniority date and used as firemen. It further proposes that individuals so restored should be reimbursed for any monetary losses sustained by them as a result of the termination of their employment and for expenses that they may have incurred by way of travel, lodging and meals, etc., or as a result of sale of homes. This Notice uses the terms "application or misapplication" of the Award, and denominates the termination of employment under the Award as being "improper". Manifestly, the use of such phraseology is not to be commended. The Board that rendered the Award was created under the law of the land and its Award has eventuated in a judgment of the Court. Irrespective of the inappropriateness of the phraseology, the purpose of the Notice is not only to set aside the Award and to restore firemen whose employment has been lawfully terminated, but in addition to provide for the payment of damages or losses alleged to have been sustained by them. Manifestly, this is not permissible. The validity of the Award and of any steps taken under it during its effective period, are obviously not "bargainable issues".

It follows hence that Notices 1 and 2 are not valid under Section 6 of the Railway Labor Act and that, consequently, there is no obligation on the part of the carriers to enter into negotiations concerning the subject matter of these Notices. The union may not resort to unilateral action or have recourse to self-help in order to bring about the results sought by the Notices. In other words, any strike for that purpose would be illegal as in violation of the Railway Labor Act and subject to injunction.

At the trial counsel for the union moved to dismiss the complaint as to three of the carriers and also as to the railroads constituting the Southern Railway System, on the ground that Award 282 was inapplicable to them. For reasons stated at the trial and also discussed in the opinion

of this Court in the *Akron* case, *supra,* the motion was denied.

The union also reiterated its position that the Norris-LaGuardia Act was applicable to any attempt to enjoin any strike of railroad employees. For reasons fully stated by this Court in its opinion in the *Akron* case, which it would be surplusage to repeat, the Court holds that the Norris-LaGuardia Act is not applicable to an action or motion for such an injunction or a temporary restraining order.

In conclusion this Court may summarize its rulings as follows:

1. The termination of the two-year effective period of the Award of Arbitration Board 282 did not restore the rates of pay, rules, and working conditions existing prior to the enactment of the Joint Resolution of Congress of August 28, 1963. On the contrary, the provisions of the Award and actions taken under it during its effective period created a new set of rules and working conditions as of the date of its termination. Any attempt to change the new status may be pursued only by serving appropriate notices under Section 6 of the Railway Labor Act and invoking the course of action in the various stages prescribed by that statute.

2. Rights that have become vested as a result of the operation of the Award remain vested, and are not nullified. Thus, firemen having more than ten years' seniority retain the permanent status accorded to them by the Award until death, retirement or resignation. Firemen having a seniority of two to ten years, who have accepted comparable jobs with a five year guarantee of employment retain that guaranty. Firemen whose employment has been severed and who have received severance allowances, retain the money that has been paid to them. The positions that have been abolished as a result of the operations of the Award are permanently abolished.

4. Whenever any fireman who has a vested seniority under the Award dies, retires, or resigns, the position that he had filled is automatically abolished and consequently no one need be designated to fill it.

5. As no further steps may be taken under the Award after the termination of its effective period, the carriers may not dispense with any more firemen pursuant to the terms of the Award, or offer comparable jobs to any of them. The fact that in some instances the carriers have been prevented by State "full crew" laws from severing the employment of some firemen in accordance with the Award, does not authorize the carriers to dispense with them or offer them comparable jobs after the repeal of any "full crew" law.

6. Notices that were served under Section 6 of the Railway Labor Act, during the effective period of the Award, although premature, are nevertheless to be regarded as having been legally served and need not be served again. They did not become effective, however, until the day after the termination of the effective period of the Award and there was no obligation on the part of either side to proceed to conferences, negotiations, or mediations required by the Act until after that date.

7. Notices 1 and 2 served by the Brotherhood of Locomotive Firemen and Enginemen purportedly under Section 6 of the Railway Labor Act are invalid in that they do not relate to matters subject to collective bargaining under the statute, but are attempts to abrogate the provisions of the Award of Arbitration Board 282, and in effect to restore the situation as it existed on August 28, 1963 with a reimbursement for losses alleged to have been sustained by firemen who have been discharged. These notices being illegal and ineffective, need not be complied with.

8. The Norris-LaGuardia Act does not apply to any action or motion for a preliminary or permanent injunction, or restraining order against a strike in violation of the provisions of the Railway Labor Act.

9. Any strike of railroad employees called before the exhaustion of all remedies provided by the Railway Labor Act would be illegal.

10. The prayer for a permanent injunction against a strike is hereby granted.

Counsel may submit an appropriate judgment in accordance with the foregoing rulings.[5]

ALEXANDER HOLTZOFF,
United States District Judge.

May 9, 1966.

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[5] Counsel for the Brotherhood of Locomotive Firemen and Engenemen, shortly prior to the trial of this action, filed a motion that the Judge disqualify himself, and this motion was accompanied by a so-called "affidavit of bias and prejudice". The Court denied the motion and overruled the affidavit. This action was based on two grounds: first, the affidavit was not timely filed in that it was submitted after a number of motions were heard and disposed of in this action; second, the affidavit contained no showing that the Judge had any personal bias or prejudice against the Brotherhood, but merely that the Judge had made certain rulings that were adverse to the Brotherhood. The fact that adverse rulings are made by a Judge is not a ground for an affidavit of bias and prejudice. It may be noted in passing that the affidavit ascribes to the Judge a statement that the Court would not *sua sponte* take steps to enforce the collection of the fine theretofore imposed, but this could be done only on the motion of the carriers or of the Government. This statement was in fact made by the Judge from the bench in open court in view of the fact that the fine was imposed for civil and not criminal contempt. It was made during a hearing on some of the many motions in this litigation. Obviously, this statement does not establish personal bias or prejudice, but quite the contrary. The authorities on these points were thoroughly reviewed by Judge Sirica of this Court in *United States* v. *Hanrahan*, 248 F. Supp. 471, and by Judge Wilson of the Eastern District of Tennessee, in *United States* v. *Hoffa*, 245 F. Supp. 772. This Court refers to and agrees with the discussion of the law on this subject in those two cases, and it would be surplusage to repeat it here.

APPENDIX B

Appeals from the United States District Court
for the District of Columbia

Decided May 12, 1967

Mr. Milton Kramer was on the brief for appellants in Nos. 20,152, 20,229 and 20,249 and appellees in No. 20,172.

Mr. James D. Hill for appellant in No. 20,158 and appellee in No. 20,191.

Mr. Joseph L. Rauh, Jr., with whom *Messrs. John Silard, Daniel H. Pollitt, Isaac N. Groner, David Epstein* and *Stephen E. Moss*, were on the brief for appellant in Nos. 20,192 and 20,193 and appellee in Nos. 20,215 and 20,216.

Mr. Francis M. Shea, with whom *Mr. Richard T. Conway* was on the brief for appellants in Nos. 20,172, 20,191, 20,215 and 20,216 and appellees in Nos. 20,152, 20,158, 20,192, 20,193, 20,229 and 20,249. *Messrs. David Booth Beers* and *Ralph J. Moore, Jr.*, also entered appearances for appellants in Nos. 20,215 and 20,216.

Before DANAHER, *Circuit Judge*, BASTIAN, *Senior Circuit Judge*, and LEVENTHAL, *Circuit Judge*.

LEVENTHAL, *Circuit Judge*: * This opinion deals with a number of appeals and cross-appeals in the railroad work rules litigation.

It may help if at the outset we indicate generally the nature of our views, though their precise exposition and the complexity of the issues require a long opinion. Part I of this opinion reviews the history of the passage by Congress in 1963 of a law providing for compulsory arbitration of the work rules controversy with an Award of two years duration. In Part II we approve the conclusion of the District Court that the work rules in effect following the expiration of the Award in 1966 did not revert to the 1963 condition and that the new plateau of work rules, established for early 1966 by the Award, continued in

* As amended by Order of July 18, 1967.

effect unless changed in accordance with the Railway Labor Act. In Part III, reversing a ruling of the District Court, we hold that even prior to the expiration of the Award the carriers had a statutory duty to respond to notices of the unions and begin collective bargaining about the rules to become effective following the expiration of the Award. In Part IV we conclude, reversing the District Court, that the railroad companies violated their duty to bargain with the Firemen, on the notice relating to prospective work rules, and with the Trainmen. We affirm other aspects of the decree, albeit for reasons somewhat different from those of the District Court, since we conclude that the railroads had no statutory duty to bargain over either another notice served by the Firemen, which sought to undermine rights vested under the Award, or the early notice served by the Conductors.

I

Understanding of the issues will be aided by a historical review of the problem.

The phenomenal growth of railroads in the 19th century was accompanied by evolution of complementary employee organizations. Railroad workers were among the first to organize unions to present employee demands collectively. The Order of Railway Conductors was founded in 1868, the Brotherhood of Railroad Firemen and Enginemen in 1873, and the Brotherhood of Railroad Trainmen in 1883. Labor relations in the railroad sphere has been the subject of Congressional enactments, and is now governed essentially by the Railway Labor Act.[1]

The last hundred years have also witnessed the evolution of an elaborate "common law" embracing the relations of railroad management and labor. There exists a roughly defined system that is the product of long-established practices and understandings, collective bargaining agreements, court decisions and administrative orders. The system covers among other things the manning of trains and

[1] 45 U.S.C. §§ 151-63 (1964), as amended, 45 U.S.C. § 153 (Supp. II, 1966).

the assignment of tasks to employees. These principles and patterns of behavior are collectively denominated "work rules."[2] As the Supreme Court has aptly put it, the railroad industry with its complex of regulations is virtually a "state within a state."[3]

Work rules concerning firemen date from the early days of the industry. Their initial chore was to select and load fuel into the wood-burning locomotive. The appearance in the late 1920's of the diesel engine spawned the problems that beset the industry to this day. The carriers consistently contended that the former loaders of wood were now merely dead wood. Yet beginning in 1933 the Brotherhood of Locomotive Firemen and Enginemen (hereafter BLFE) negotiated individual agreements with various carriers to preserve the continued status of firemen-helpers. The BLFE in 1937 joined with substantially all United States carriers in signing the National Diesel Agreement, providing for the employment of firemen-helpers on practically all diesel powered locomotives. Similar terms endured in subsequent contracts, including the Diesel Agreement of 1950.

While work rules retaining positions for firemen became thus established, the industry's quest for modernization resulted in almost one hundred percent diesel operation. In 1956 the carriers gave hint that intense competition from other modes of transport and the resulting financial pressure would no longer permit preservation of the ancient status. During negotiations on their proposal to give management the discretion to determine the employment of firemen the carriers withdrew this plan by agreeing to a three-year moratorium on such changes in work rules. But the die had been cast, and the carriers argued that the verdict of history and technology had come in, pronouncing railroad firemen extraneous members of a train crew. So too, they asserted, advanced technology and innovations

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[2] *See generally* Comment, *The Railway Work Rules Dispute—A Precedent for Compulsory Arbitration*, 14 DE PAUL L. REV. 115 (1964).

[3] *See* Whitehouse v. Illinois Cent. R.R., 349 U.S. 366, 371 (1955), quoted by Fortas, J., dissenting in Transportation-Communication Employees Union v. Union Pac. R.R., 385 U.S. 157, 176 n. 5 (1966).

would permit sharp reductions in the level of what is called the "crew consist," specifically the number of brakemen needed for the safe operation of the train.

It is against the backdrop of the always "sensitive and touchy problem"[4] of overmanning and efforts to overcome it that we focus on the events more immediately leading up to these appeals. In 1959 the carriers served notices under Section 6 of the Railway Labor Act,[5] proposing the elimination of firemen from freight and yard service, and the abrogation of regulations fixing the size of train crews. The following year, 1960, the unions served a series of counter-proposals directed at continuing and even extending the use of firemen and at setting the crew consist level at not less than one conductor and two brakemen plus such additional trainmen as the assurance of maximum safety demanded.

Shortly thereafter, in an effort to aid in the adjustment of this dispute, President Eisenhower appointed a special Presidential Railroad Commission to study the various facets of the problem. This Commission issued its report and recommendations in 1962. In general the carriers accepted the findings, but the unions balked.

Meanwhile, the lengthy procedures contemplated and mandated by the Railway Labor Act continued. Negotiations and mediation failed to bridge the gulf between the

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[4] Brotherhood of Locomotive Engineers v. Chicago, Rock I. & Pac. R.R., 382 U.S. 423, 430 (1966).

[5] 45 U.S.C. § 156 (1964): Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

parties. The atmosphere of crisis heightened, for the Supreme Court ruled in March of 1963 that all the tools of the Act prescribed for the parties had been tried and found inadequate, and they were thus free to resort to self-help: that is, the unions could lawfully strike, or the carriers could unilaterally impose the new rules.[6]

The last device in the statutory arsenal was invoked. Acting under Section 10 of the Railway Labor Act, 45 U.S.C. § 160, the President, on a finding by the National Mediation Board of the threat of deprivation of essential transportation services, convened an Emergency Board to make a prompt investigation and report. For thirty days following the rendition of such a report no party may take unilateral action. The investigation was made and the report was filed.

Once again the unions proved unwilling to accede to the recommendations of others. During July of 1963 a flurry of tense negotiations was spurred by the active intervention of President Kennedy and the participation of Secretary of Labor Wirtz. The unions rejected the President's proffer of the services of Justice Arthur Goldberg as arbitrator of the dispute. For a fleeting period it appeared that voluntary arbitration would provide the answer, but though the parties indicated willingness in principle they could not get together in the procedural particulars of arbitration.

A strike was imminent. The country was faced with a serious emergency. No outstanding techniques remained to move the antagonists to a responsible accord. Only Congress could avert a national catastrophe, and it was to Congress that President Kennedy turned for unprecedented measures.[7] The Administration proposal, submitted July 22, 1963,[8] would have authorized the Interstate Commerce Commission to serve, in effect, as the agency for compulsory settlement of the threat by empowering it to

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[6] Brotherhood of Locomotive Engineers v. Baltimore & O. R.R., 372 U.S. 284, 290-91 (1963).

[7] *See Message from the President of the United States Relative to Railroad-Labor Dispute*, H.R. Doc. No. 142, 88th Cong., 1st Sess. (1963).

[8] S. J. Res. 102, 88th Cong., 1st Sess. (1963).

put into effect, on the application of the parties, any of the changes proposed in the notices of 1959 and 1960 with such modification as it found appropriate in reconciling the private and public interest. That resolution made it clear that these were to be only interim work rules to be effective until the parties themselves agreed on more permanent terms, but in no event to last for more than two years.

The law that was actually passed differed in various particulars from the Administration measure. The "one significant change" [9] made was the substitution of an independent *ad hoc* board of arbitration for the Interstate Commerce Commission, principally for the reason that Congress wanted to emphasize the peculiar and non-precedential nature of its emergency intervention. By August 28, 1963, this unique compulsory arbitration law, Public Law 88-108, had passed both Houses of Congress and received presidential approval. We set out this statute in an appendix to this opinion.

Public Law 88-108 expressly forbade any unilateral self-help by the parties who had served or received the notices of 1959 and 1960. It created a Board of Arbitration (since designated Board 282), to be composed of seven members, two each representing the carriers and unions, and the other three to be selected by the President if, as happened, the parties could not agree even on mutually acceptable neutral members. The Board was ordered to pass on the two focal issues of the use of firemen and the size and composition of train crews. The Award (since designated Award 282) was to "be binding on both the carrier and organization parties to the dispute and . . . constitute a complete and final disposition of the aforesaid issues. . . ." (Section 3). The effective date of the Award was set at sixty days after filing in the United States District Court for the District of Columbia. According to Section 4 the Award was to "continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect,

[9] Brotherhood of Locomotive Engineers v. Chicago, Rock I. & Pac. R.R., *supra* note 4, 382 U.S. at 432.

unless the parties agree otherwise." [10] It is this provision specifying the maximum mandatory duration that has sparked the issues we are now required to judge.

The Board met, held hearings, took evidence. It issued an Award that provided: "This Award shall continue in force for two years from the date it takes effect, unless the parties agree otherwise." An important extension agreement is that of the carriers and BLFE, which extended the termination date to March 30, 1966. Except for such agreement the Award expired at the close of the two year period on January 24, 1966.[11]

Award 282 held that the nearly two hundred carriers involved could eliminate ninety percent of the firemen positions, and set forth a procedure for dismissal and attrition. It was a staggering blow to the BLFE. The Award did not, however, authorize a single spasmodic discharge of thousands of firemen. Indeed, in some aspects it was "highly favorable to the employees," *see In re Certain Carriers, Etc.*, 229 F. Supp. 259, 261 (D.D.C. 1964). Thus the Award guaranteed permanent employment for life, or until retirement or resignation, for every fireman who had been in active service for more than ten years,

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[10] The measure was somewhat analogous to the legislative intervention in a 1916 rail dispute when Congress decreed that eight hours was to be the measure for a standard day in determining compensation, and forbade reduction in the standard day's wage until thirty days after findings were announced by a special commission created to study this system, to report back in six-to-nine months. The Supreme Court upheld this statute, characterizing it as a form of compulsory arbitration that was "limited" to a "reasonable period" fixed by the statute. *See* Wilson v. New, 243 U.S. 332, 345, 346, 351 (1917); *Message from the President, supra* note 7, at 4-5; S. Rep. No. 459, 88th Cong., 1st Sess. 8 (1963).

[11] The parties and the District Court have all accepted and implemented the Award as effective January 25, 1964. With that date marking the first day of the two-year period it is clear that the full two-year period expired at the end of January 24, 1966. We see no valid basis for the assumption of the District Judge that the Award was in existence on January 25, 1966. It may be regrettable, but we consider the Award rendered on January 25, 1966, by a special board of adjustment with respect to a dispute between BRT and the Green Bay & Western Railroad Co. and Kewanee, Green Bay & Western Railroad Co. to be without legal significance, unless it has been adopted by agreement of the parties, a question not before us.

with a comparable job insured for all with service of two years or more. Those firemen with less than two years seniority were accorded severance allowances, amounting in some cases to six months pay. Under the terms of this Award the carriers have pruned eighteen thousand firemen from their ranks, paid out some $36,000,000 in separation benefits, and provided comparable jobs to twelve hundred former firemen.

On the crew consist issue, the Board determined that a single national standard would be inappropriate. It ruled that no change in crew consist be made except pursuant to the Award. Then it provided that where existing work rules required more or less than two trainmen, any party might give notice of a proposed change. If after conferences were held by the local properties no agreement was forthcoming, the issue could be referred to a special board of adjustment created at the local level. The Award articulated a series of "guidelines" to be followed by these special boards in resolving particular disputes. Many crew consist agreements and special awards were made under this procedure.

Pursuant to Section 9 of the Railway Labor Act, 45 U.S.C. § 159 (1964), as incorporated by reference in Section 4 of Public Law 88-108, the unions sued in the District Court for the District of Columbia to impeach the Award. The attack was two-pronged. First, they contended that the statute authorizing compulsory arbitration in this context was unconstitutional as beyond the power of Congress, or in the alternative as delegating power to an administrative body without adequate specificity of standards. Second, the unions argued that the Award did not conform to the statute under which it claimed vitality. The District Court rejected both challenges, and both approved the statute and confirmed the Award. *Brotherhood of Locomotive Firemen* v. *Chicago, B & Q. R.R.*, 225 F.Supp. 11 (D.D.C. 1964). This court affirmed,[12] 118 U.S.App.D.C. 100, 331 F.2d 1020, and the Supreme Court denied certiorari, 377 U.S. 918 (1964).

In subsequent months there poured into the courts, here

[12] One judge dissented on the ground that the constitutional issues should have been referred to a three-judge district court.

and elsewhere, a number of actions, some brought by unions and some by railroads, presenting a plethora of particular problems,[13] but these skirmishes need not detain us. What is critical to the situation now before us is this. Instead of using the two-year period specified by Congress and the Award to continue meaningful negotiations looking toward long range adjustments of the various vexing problems, guided by the experience gleaned from functioning under the Award's interim rules, the parties apparently focused on whether the expiration of the Award would leave them in a better position than they might achieve by return to the collective bargaining table, where some concessions might have to be made.

The positions adopted by the parties, distilled to their essentials, were as follows: The Unions believed that upon expiration of Award 282, authorized by Congress as a "final" settlement for a period "not to exceed two years," it would have no continuing significance. They assumed that immediately upon the expiration of the Award the status quo ante would revive and the National Diesel Agreements would once more control. This position was shared by the other unions who presumed the prior crew consist rules would return from a two year consignment to limbo. But as a hedge the unions also, during the effective period of the Award, served notices proposing in substance that on termination of the Award there would come into effect rules that were substantially similar to the old work rules, with relatively minor adjustments.

Not surprisingly, the carriers took a different view. As they saw it, the status created by Award 282 had an enduring quality that transcended the formal effective period

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[13] These actions were largely concerned with the proper construction of the statute or award in regard to individual fact situations. *See, e.g.*, Brotherhood of Railroad Trainmen v. Certain Carriers, Etc., 121 U.S. App. D.C. 230, 349 F. 2d 207 (1965); Brotherhood of Railroad Trainmen v. Chicago, M., St. P. & Pac. R.R., 120 U.S.App.D.C. 295, 345 F. 2d 985 (1965); Atchison, T. & S.F.Ry. v. Brotherhood of Railroad Trainmen, 324 F. 2d 899 (7th Cir. 1963); In re Certain Carriers, Etc., 231 F. Supp. 519 (D.D.C. 1964); Brotherhood of Railroad Trainmen v. Missouri Pac. R.R., 230 F. Supp. 197 (E.D.Mo. 1964); In re Certain Carriers, Etc., 229 F. Supp. 259 (D.D.C. 1964).

of that Award. But they too, "just in case," served counter-proposals on the unions to preserve the benefits the Award had carved for them. As will appear in greater detail, the carriers declined to discuss the merits of any of these notices at the few conferences that were held prior to the termination of the Award, reasoning that although Public Law 88-108 and the Award permitted bargaining during that period they nevertheless stopped short of imposing a legal duty to do so. These are the two central questions of these appeals: What rules were in force the day after Award 282 expired? What was the duty of the parties to bargain about changing those rules, and when did it arise?

These appeals reach us from the orders disposing of suits and counter-suits seeking declaratory and injunctive relief, brought by the carriers and by the Brotherhood of Locomotive Firemen and Enginemen (BLFE), the Brotherhood of Railroad Trainmen (BRT), and Switchmen's Union of North American (SUNA), and the Order of Railway Conductors and Brakemen (ORCB). *See generally Bangor & A.R.R.* v. *Brotherhood of Locomotive Firemen,* 253 F.Supp. 682 (D.D.C. 1966) (Nos. 20192, 20193, 20215, and 20216); *Akron & B. Belt R.R.* v. *Brotherhood of Railroad Trainmen,* 250 F.Supp. 691, 252 F.Supp. 207 (D.D.C. 1966) (Nos. 20152, 20172), *supplemented,* 254 F.Supp. 306 (D.D.C. 1966) (Nos. 20229, and 20249); *Akron & B. Belt R.R.* v. *Order of Railway Conductors,* 253 F. Supp. 538 (D.D.C. 1966) (Nos. 20158 and 20191).[14]

II

In advance of the trial of these cases, the parties consented to the preliminary adjudication of the effect of the expiration of Award 282. In a guideline opinion underlying subsequent rulings, the District Court held that, even

[14] Appeal No. 20316, Brotherhood of Locomotive Firemen (and H. E. Gilbert) v. Bangor & A.R.R., arises from an adjudication of contempt for violating a temporary restraining order. Although it was argued together with these cases, it presents different questions and is being considered separately. *See* Bangor & A.R.R. v. Brotherhood of Locomotive Firemen, 255 F. Supp. 476 D.D.C. 1966).

though the Award formally terminated, it had created a "new plateau" of work rules, which were to continue in force until changed pursuant to the regular procedures of the Railway Labor Act.[15] *See Akron & B. Belt R.R.* v. *Brotherhood of Railroad Trainmen*, 250 F.Supp. 691, 695-97 (D.D.C. 1966).

The BLFE argues that the intention of Congress in giving the Award a limited 2-year life was to deny it any further legal effect, to leave the parties as if the award had never been in existence, and to restore the status quo ante with the result that the day after the Award expired the work rules in effect were the same as those in effect when the statute was passed. This approach has a kind of formal logic, and certain provisions of Public Law 88-108 could be read this way. Our aproach in ascertaining "legislative intent" is hampered by the fact that the possibility that by the end of the formal duration of the Award the parties might not have agreed on anything to take its place is a subject on which the legislative history is, to use Justice Harlan's phrase, "essentially negative, which shows with fair conclusiveness only that Congress was not squarely faced with the problem this case presents."[16] In our case there is the added consideration that Congress was undoubtedly aware of the problem but apparently thought wisdom lay in avoidance of express delineation.

We think the mere limitation of the effective period of the Award neither implies nor compels the construction the unions seek. Our ruling is that the work rules created by the Award constituted a new plateau that was not automatically eroded when the Award expired. The legal underpinning for our ruling is not the Joint Resolution, which expired after 180 days of life—except insofar as necessary to sanction the Award. The ruling is not based on the Award, which had only a 2-year life, or on any agreement of the parties. The predicate of our ruling is, simply, the

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[15] *Compare* Manning v. American Airlines, Inc., 329 F. 2d 32, 34 (2d Cir.), *cert. denied*, 379 U.S. 817 (1964). *See also* Manning v. American Airlines, Inc., 221 F. Supp. 301 (S.D.N.Y. 1963).

[16] *National Woodwork Mfrs. Ass'n* v. *NLRB*, —— U.S. ——, ——, 35 U.S.L.W. 4349, 4360 (U.S. April 17, 1967).

force of the Railway Labor Act. Certain work rules were in force on January 24, 1966 (or March 30, 1966, in the case of the BLFE). The mandate of the Railway Labor Act requires that the work rules in effect on any particular day shall also be in effect the following day—beyond the power of either party to institute a unilateral modification —subject to change only in accordance with the procedures prescribed by the Act. These procedures begin with the notices required by Section 6 to be served by any party seeking a change at least thirty days in advance of the proposed effective date of such change. This new-plateau reasoning applies even though the work rules are established by agreements of limited duration. "The effect of § 6 is to prolong agreements subject to its provisions regardless of what they say as to termination." [17] It likewise applies even though the work rules are established by an arbitration award of limited duration.

This by no means suggests that there is no legal significance in establishing an award or agreement as one of limited duration. The limited duration has the obvious significance that work rules can be changed for the post-expiration period. The work rules can be changed, however, only by compliance with the provisions of the Railway Labor Act prescribing how changes in work rules are to be effectuated.

What we are in effect holding is that since Public Law 88-108 is silent as to the applicable legal rule, the case is governed by the combination of undeniable physical facts plus the general legal rule of the Railway Labor Act. The BLFE is constrained to find superseding intention in Public Law 88-108 which would in effect obliterate not only the Award as a document with legal effect but also the physical facts that came into being during the 2-year period. We think its construction of Public Law 88-108 would be unreasonable and inconsistent with the purposes and context of the legislation. It must have been reasonably contemplated that the Board of Arbitration might order deflation of the scope of existing overmanning. And it seems obvious that an automatic rescinding of any such pruning at

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[17] Manning v. American Airlines, Inc., *supra* note 15, 329 F. 2d at 34.

the instant the Award was to terminate would spark the most unsettling havoc. To reach this result would necessarily mean trying to recreate a practically unrecoverable situation and sweeping away a host of rights that had already vested concomitant with the award, made final under the Act, permitting reductions in the work force. Such a view would also wipe out the supposedly permanent guaranty of employment for those thousands of employees whose seniority, the Award decreed, entitled them to lifetime protections.

III

We turn now to the question to what extent and by what procedure the parties could and did lawfully invoke the machinery prescribed by the Railway Labor Act in order to change the work rules in effect on the railroads at the expiration of the Award, rules that had been prescribed by the Board (including the crew consist rules prescribed by various local boards).

As already stated, these work rules were not immutable. Congress had enacted a compulsory arbitration measure of limited duration. The appropriateness of a limited duration for a compulsory arbitration measure, articulated by the Supreme Court 50 years ago in *Wilson* v. *New*, had been emphasized by the President and Congress.[18]

When were the parties to bargain about possible changes in the work rules that survived the Award? All parties agree that negotiation during the pendency of Award 282 was permissible, but the carriers say it was not obligatory. In our opinion, however, bargaining during the pendency of the Award 282 was not merely a matter for the whim of the parties but was to be governed by provisions of the Railway Labor Act, and these provisions remained in effect during the life of the Award for purposes of regulating the responsibilities of the parties to bargain concerning changes proposed to become effective *after* the expiration of the Award.

The principles and objectives underlying Public Law 88-108 reveal that Congress placed a high premium on the opportunity for continued collective bargaining during

[18] *See* Note 10 *supra*.

the life of the Award, in the hope and expectation, apparently shared at that time by the parties themselves, that the unions and carriers would themselves work out a long range solution to these sensitive problems by the traditional devices of collective bargaining. This special statute served to give the Nation a temporary respite from the threat of a disastrous national rail strike by forbidding for two years any unilateral changes or resort to self-help and imposing instead interim rules to cover the situation. But as we have seen, both the statute and the Award expressly contemplated that the parties were free to alter or extend the rules fixed by Award.[19]

Public Law 88-108 established a procedure for formulating rules to govern for up to two years, in the absence of a negotiated pact. This did not displace the otherwise applicable provisions of the Railway Labor Act on the duty to bargain on changes proposed to become effective subsequent to the two-year period. President Kennedy in his message to Congress expressed the desire that the parties continue to confer on the ultimate resolution of their disputes.[20] A chief spokesman for the carriers, Mr. J. E. Wolfe,[21] assured the Senate Committee that the carriers understood that the Administration's bill "imposes a duty on the parties to attempt to settle their differences" and would "protect the public interest as a result of the establishment of these interim rules for a period of 2 years or less while the parties undertake, through collective bargaining, to bring about a more permanent solution of the problems."[22] We are aware that in the reshaping of the measure the duty to bargain on the work rules was not expressly spelled out, but the plan was surely retained. Indeed the preambles of both measures expressly and un-

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[19] Indeed, on the crew consist issue, Section III.A(1) of the Award remanded the dispute to local properties "for negotiation", and only if these further efforts to reach a settlement proved pointless were special boards of adjustment to be convened to fix the temporary rules.

[20] *See Message from the President, supra* note 7, at 6-8.

[21] Chairman of the National Railway Labor Conference, an organization whose members conduct about ninety percent of all railway operations in the United States.

[22] *Hearings on S.J.Res. 102, Before the Senate Comm. on Commerce,* 88th Cong., 1st Sess., ser. 24, at 375 (1963).

equivocally proclaimed the care taken to select a system which solved the immediate emergency "in a manner which preserves and prefers solutions reached through collective bargaining." Changes were made by the Congress—notably the substitution of an independent *ad hoc* board for the Interstate Commerce Commission as the arbiter for the dispute.[23] There was not a breath of a suggestion, however, that Congress intended to remove or even downgrade the policy that the parties themselves should confer in order to reach long-range solutions through collective bargaining and agreement.

The carriers contend that all this means only that the parties were free to bargain during the Award if they wished, or even that they were encouraged to do so, but that for the two-year period the special act repealed pro tanto and by implication the duty under the Railway Labor Act to confer on proposed rule changes. We disagree. In our view Public Law 88-108 was intended to work the minimum disruption of permanent railroad legislation and normal collective bargaining. The only disruption wrought, the only "repeal by implication", was that which necessarily accompanied the objective of staving off a cataclysmic strike by imposing a temporary settlement. We detect no glimmer of an intimation that the carriers were authorized to regard this as a two year hiatus in their obligation to bargain. Rather, we find much to militate against such a construction.

It is notable that the parties to this dispute had already agreed to submit their controversy to arbitration. They stumbled over procedural details. Congress viewed its role primarily as draftsmen of the specifics of an arbitration agreement to which the carriers and unions had already agreed in principle.[24] The statute in Section 4,

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[23] The Supreme Court referred to this substitution as the only "significant change" from the Administration bill. Brotherhood of Locomotive Engineers v. Chicago, Rock I. & Pac. R.R., *supra* note 4, 382 U.S. at 432.

[24] *See* S. Rep. No. 459, 88th Cong., 1st Sess. 9 (1963); H.R. Rep. No. 713, 88th Cong., 1st Sess. 12-13 (1963); Brotherhood of Locomotive Firemen v. Chicago, B. & Q. R.R., 225 F. Supp. 11, 18 (D.D.C.), *aff'd*, 118 U.S. App. D.C. 100, 331 F. 2d 1020, *cert. denied*, 377 U.S. 918 (1964).

the Award in Part IV, and the reports of both congressional committees carefully specified that the effective duration of the Award was limited to no more than two years, unless extended by stipulation, in order to restrict the "scope and impact" of the statute.[25]

In essence then we have a mechanism tantamount to an arbitration agreement, albeit one drafted by Congress, that confers on the arbitrator the power to impose a settlement binding for up to two years. It becomes appropriate, then, to consider what would have been the rights and duties of the parties if they had themselves written the arbitration agreement. We are not concerned here with customary adjudicatory or grievance arbitration. Although so-called "legislative" arbitration agreements are relatively infrequent they are not unknown. Under such agreements, prospective rules and working conditions, instead of being determined by agreement of the union and employer, as is customary, are determined by an arbitrator to whom the function is delegated.[26] Such a determination by arbitration is equivalent to a determination by agreement insofar as the rights and duties of the parties concerning future modification are concerned. An arbitration award does not operate to "prevent the [parties] from seeking through negotiations under the procedures provided for by the Railway Labor Act or otherwise a new agreement . . . covering the rules. . . ."[27]

Responsible conduct of the process of collective bargaining, for consideration of proposals to modify work rules established by an agreement or award of limited duration, embraces conference and consultation prior to the termination date. This is the way responsible businessmen deal with each other when they plan to continue a business relationship—for example, in negotiating on a contract or lease before its expiration date. This is the

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[25] S. Rep. No. 459, 88th Cong., 1st Sess. 10 (1963); *see* H.R. Rep. No. 713, 88th Cong., 1st Sess. 14-15 (1963).

[26] *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 30-47 (rev. ed. 1960).

[27] Sheehy, Ch.J., in Brotherhood of Railroad Trainmen v. St. Louis Sw. Ry., 220 F. Supp. 319, 326 (E.D. Tex. 1963).

way responsible employers and unions implement the collective bargaining process, and respond to calls for change. And this is the way railroads and railroad unions must respond under the mandate of the Railway Labor Act.

The purpose of a Section 6 notice is "to fix a procedure for the commencement of conferences between representatives of the two parties if changes are to be made in the contract."[28] No rigid form for these notices is defined in the statute.[29] All that is specified is thirty days written notice of a proposed change. The Act requires that within ten days a time and place for conference be set, and that the first conference be held within the 30-day period.

To recapitulate, the Railway Labor Act not only requires railway employers and unions to confer and bargain on work rules established by agreements or awards having a fixed expiration date when one party wants to change the rules, but permits the statutory machinery to be invoked *prior* to expiration in order to seek an agreement on changes to become effective on or after expiration.

If an agreement (or award) contains a fixed expiration date, rather than the common indefinite or automatic self-renewal term, then the notice must indicate a proposed effective date for changes that is not only at least thirty days after the notice, but also a time after the outstanding agreement or award expires. Nothing in the Railway Labor Act, or the scheme of Public Law 88-108, forbids service of a notice more than thirty days before the suggested rules would or could be effective, and nothing relieves the recipient from the duty to commence bargaining at that earlier stage.

The carriers seek to buttress their claim of pro tanto repeal by implication by arguing that it can hardly be supposed that Congress intended to permit the unions to ready themselves to strike on January 25, 1966. The only forecast of that day we can find in the legislative history

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[28] McMullans v. Kansas, O. & G. Ry., 229 F. 2d 50, 56 (10th Cir.), *cert. denied*, 351 U.S. 918 (1956).

[29] *See* Detroit & T.S.L.R.R. v. Brotherhood of Locomotive Firemen, 357 F. 2d 152, 153 (6th Cir. 1966).

is the assumption that it would be preceded by an agreement of the parties. And that in turn, in our view, assumes that responsible collective bargaining would have been in train some time prior to the expiration date. If we turn from speculation about legislative intent to the realities of the Railway Labor Act, we are aware that the conferences triggered by section 6 notices are typically the beginning and not the end of the statutory procedures. If conferences proposed by a Section 6 notice are unavailing, either party can invoke the services of the National Mediation Board. While negotiations continue or the Board has jurisdiction, no self-help is permitted. The parties are free to submit their controversy to arbitration. If none of these techniques resolves the matter, the President may convene an emergency board to investigate the dispute and report back on the issues. Only when all these steps have been exhausted are the parties permitted to act unilaterally. "For the procedures of the Act are purposefully long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." [30]

We do not say that the time of service of notice is completely irrelevant to the duties of the parties. It may be that a notice served the day after the Award would betoken bad faith to the point of vitiating its validity. We shall have occasion to point out that certain union notices were defective for analogous reasons. But the mere fact that the union notices were served prior to January 25, 1966, did not relieve the carriers of their duty to confer and bargain prior to January 25, 1966. We are not considering a case where the railroads, while conceding that the unions had a right to begin bargaining prior to the expiration date, responded that the particular notice came too early, perhaps on the ground that it did not permit enough experience under the existing rules to spawn realistic and informed bargaining. In the case before us the carriers flatly refused to engage in any statutory bargain-

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[30] Brotherhood of Railway Clerks v. Florida E.C. Ry., 384 U.S. 238, 246 (1966). See also Farmer, *Compulsory Arbitration—A Management Lawyer's View*, 51 VA. L. REV. 396, 401-02 (1965).

ing whatever prior to the expiration date. Except in the case of objectionable union proposals discussed below, the carriers before us must be held to have breached their statutory duty under the Railway Labor Act to confer and bargain on the merits of proposed changes in work rules. The decree of the District Court embodies a contrary declaration, and to that extent it is reversed.

We now consider the effect of our reversal of the District Court's ruling that the notices were not effective to require negotiation until after termination of the Award. As we have seen, conferences are but the first step in the chain of Railway Labor Act procedures. Once they have been frustrated, one side to the dispute can move to the next tier of procedures, and indeed in at least one series of cases involving parties before us the National Mediation Board has accepted jurisdiction of the controversy. The carriers have foresaken their right to insist on conferences by their refusal to respect effective Section 6 notices. The standard for good faith bargaining is quite liberal. Certainly it does not compel agreement. Judge Bryan, after the most careful analysis, formulated the frequently quoted standard that the—

> requirement of good faith bargaining is really a requirement of absence of bad faith. In order to show such lack of good faith it is necessary to establish facts from which it can be reasonably inferred that a party enters upon a course of bargaining and pursues it with the desire or intent not to enter into an agreement at all. *American Airlines, Inc.* v. *Air Line Pilots Ass'n*, 169 F. Supp. 777, 794 (S.D.N.Y. 1958).

Applying such a test, the carriers have breached their duty to enter negotiations in good faith, for a refusal to bargain on an erroneous premise of law is no excuse.[31]

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[31] *See, e.g.*, Order of Railroad Telegraphers v. Chicago & Nw. Ry., 362 U.S. 330 (1960). We do not consider attempts to obtain new work rules incompatible with those imposed by the Award or with the report of the Presidential Emergency Board reflective of bad faith on the part of the unions. Compare Pullman Co. v. Order of Railway Conductors, 316 F. 2d 556 (7th Cir.), *cert. denied*, 375 U.S. 820 (1963).

IV

Although the statutory duty to bargain continued during the limited duration award, it was not unaffected by the temporary statute and the arbitration award. Their emanations do affect the conceptions of bargaining in good faith, pursuant to a good faith notice, inherent in the scheme of the Railway Labor Act. We shall develop our specific rulings by considering the three groups of unions in chronological order by dates of notices.

A. Order of Railway Conductors and Brakemen (ORCB)

One group of cases before us, Nos. 20158 and 20191, concerns the Order of Railway Conductors and Brakemen (ORCB).[32] On Monday March 23, 1965, that union, expressly relying on the provisions of the Railway Labor Act, served notices on the carriers which proposed a rule requiring not less than one conductor and two brakemen on all classes of road train service thirty days after notice. That date was, obviously, a full nine months prior to the expiration date of the Award. The carriers considered the notices premature and refused to concede any obligation to bargain on the merits of the proposals.[33] ORCB invoked the services of the National Mediation Board, which docketed the case, but suspended action when the District Court held the notices premature.

We think it manifest that the proposal to scrap the Award during its life time could be broached to the carriers to see if they were interested but could not be presented to them as a subject of bargaining that was mandatory under a statutory obligation. We agree with Judge Bryan's approach that the collective bargaining system of the Railway Labor Act subsumes and presupposes a bar-

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[32] The District Opinion is reported: Akron & B. Belt R.R. v. Order of Railway Conductors, 253 F. Supp. 538 (D.D.C. 1966).

[33] The carriers lodged a further objection on the ground that the ORCB is not the certified bargaining representative of most of the road brakemen directly affected by the notices. Compare Southern Pac. Co. v. Switchmen's Union of North America, 356 F. 2d 332, 335 (9th Cir. 1965). The parties have stipulated this issue out of these proceedings.

gaining "in good faith." [34] The issue of good faith is interlaced with "bargainability"—a term of art which means not only capable of being bargained but also a proper subject of mandatory bargaining. We have already held that the carriers were in bad faith in asserting that they had no legal obligation to bargain during the life of the Award. They had an obligation, we think, to bargain about changes to become effective with the expiration of the Award. But we also think that they had no obligation to bargain about a proposal to make changes during the life of the Award. Such an obligation would be inconsistent with an inherent and essential element of Public Law 88-108, which was intended to promote long range solutions through collective bargaining by removing the need to bargain over immediate crises.

The ORCB argues that the carrier's duty to bargain is reaffirmed by Section III of the award of Board 282 which directs the parties to resume local negotiations on crew consist. We agree that the unions could have called on the carriers to negotiate pursuant to the Award. But this is entirely different from the statutory duty imposed by Section 6 of the Railway Labor Act, upon which the union purported to rely. The Award machinery was essentially different from and displaced the Railway Labor Act concerning rules effective during the life of the Award. This is demonstrable from the provision of the Award that specified that if the parties were unable to arrive at an agreement their dispute should be referred to a local arbitration tribunal. This is, of course, entirely different from and supersedes the basic structure of the Railway Labor Act which provides for compulsory arbitration only for minor disputes, and contemplates mediation or voluntary arbitration where agreement has not settled "major disputes," i.e. disputes relating to changes in rates of pay, rules or working conditions.[35] In this context, we agree that these notices were premature.

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[34] *See* American Airlines Inc. v. Air Line Pilots Ass'n, *supra*, 169 F. Supp. at 793-95.

[35] *See* Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 722-28 (1945).

B. Brotherhood of Railroad Trainmen (BRT)

In another group of cases (Nos. 20152, 20172, 20229 and 20249) we are concerned with the Brotherhood of Railroad Trainmen (BRT).[36]

On June 30, 1965, BRT served a notice proposing that beginning January 26, 1966 (unquestionably after the termination of the Award) a new work rule be inserted in the agreements between the BRT and the carriers requiring that not less than two, or in some cases three, brakemen be included in the "crew consist" of the carrier's runs. In most instances the carriers in turn served counter-proposals with respect to crew consist rules, although they took the formal position that the BRT notices were premature and that during the life of the Award the only proper procedure for instigating crew consist changes was in accordance with Part A(3) of Section III of Award 282.[37]

The carriers' denial of an obligation to bargain with the BRT was essentially based on the contention of prematurity which we have already considered and rejected.

We turn to the carriers' current argument that Section 6 of the Railway Labor Act cannot meaningfully impose a duty to bargain during the life of the Award about changes following its expiration, since this would undercut bargaining pursuant to the Award concerning work rules during the life of the Award. We see no inherent inconsistency such as we found in discussion of the ORCB proposals. Bargaining and arbitration for rules to be in effect for a two-year period are not inherently negatived by tandem bargaining under a different system over long-

[36] These are appeals from judgments following the opinions in Akron & B. Belt R.R. v. Brotherhood Railroad Trainmen, 250 F. Supp. 691, 252 F. Supp. 207, and 254 F. Supp. 306 (D.D.C. 1966).

The Switchmen's Union of North America (SUNA) is also a party in Appeals 20152 and 20172.

[37] "Either party in interest shall give written notice of any proposed change in any such stipulated number of trainmen. . . . The time and place for the beginning of conferences between the representatives of the parties in interest with respect to such proposed change or changes shall be agreed upon within 10 days after the receipt of said notice, and said time shall be within 15 days after the receipt of said notice."

range rules. Conflict in scheduling might be a temporary problem, but it could hardly dignify a complete denial of a duty to bargain over the ultimate and dominant issues.

C. Brotherhood of Locomotive Firemen and Enginemen (BLFE)

The third major group of cases, Nos. 20192, 20193, 20215 and 20216, involves the Brotherhood of Locomotive Firemen and Enginemen (BLFE).[38]

In November 1965 this union served notices to take effect at 12:01 a.m. on March 31, 1966, the day after the Award, as extended by stipulation, was to expire. There were three notices, each made expressly pursuant to the Railway Labor Act. Notice No. 1 related to the types of engine services on which the employment of firemen would be required, and would have pegged employment at a level of 6000 jobs below the terms of the National Diesel Agreement, but far above the level provided by Award 282. Notice No. 2 provided for compensation to firemen who had been relocated, severed, or otherwise disadvantaged by the operation of Award 282. By stipulation of the parties we need not here consider Notice No. 3, which set out a training program for apprentices. The carriers contended that all such notices were premature, and further contended that the second and third were not even proper subjects of colleetive bargaining. Several abortive conferences were held, but the carriers resisted any attempts to reach the merits of the proposed rules.

In the BLFE consolidated declaratory judgment actions, the District Court agreed with the carriers on the major points, holding Notices 1 and 2 not only premature but also *non-bargainable* although the carriers had not even challenged the bargainability of the first notice. The court's interjection seems not only to have provided an additional reason for holding that the carriers had not violated a legal obligation in the past, but also to have prompted the car-

[38] These are appeals from judgments following the opinion in Bangor & A.R.R. v. Brotherhood of Locomotive Firemen, 253 F. Supp. 682 (D.D.C. 1966).

riers to seek restriction of their obligation to bargain in the future.

With the controversy thus expanded when there was already uncertainty as to the exact legal rights of the parties, the issue became the subject of a legal ruling. Since the genie can not be put back into the bottle, we turn to consideration of the soundness of the determination by the District Court, and we conclude that it was not a correct statement of applicable legal doctrine.

The District Court reasoned that—

> the employees may not in the guise of serving notices under Section 6 of the Railway Labor Act, seek to abrogate or set aside the Award. It must be borne in mind that the Award is the result of a compulsory arbitration conducted under a mandate of Congress and has the stamp of judicial approval in the form of a judgment in a proceeding to impeach it. Neither a carrier, nor a union may institute proceedings, directly or indirectly, to set aside any provision of the Award, or the operations or activities that have taken place under it or the results that have been achieved.[39]

Since these notices were found not to "relate to matters subject to collective bargaining under the statute," the court declared that they "need not be complied with." 253 F.Supp. at 689. We disagree and are of the view that Congress did not intend that either Public Law 88-108 or Award 282 would permanently excise from the scope of collective bargaining any proposals that otherwise would have been lawful under the Railway Labor Act. Applying this standard, we find that Notice No. 1 falls within the realm of proper collective bargaining, but Notice No. 2 does not.

We begin our reasons for reaching this conclusion with a review of the principles surrounding disputes about bargainability. The settled tradition under the Railway

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[39] Bangor & A.R.R. v. Brotherhood of Locomotive Firemen, *supra* note 38, 253 F. Supp. at 687.

Labor Act reveals a firm obligation on the railroads and their employees to negotiate about changes in working conditions suggested by one side or the other. In the landmark case of *Virginian Ry.* v. *System Federation No. 40, Railway Employees Dep't*, 300 U.S. 515, 548 (1937),[40] Justice Stone held that while the Act does not compel agreement, it does demand those preliminary steps, triggered by a Section 6 notice, without which no agreement could be reached. The minimum requirements are that the employer at least meet with the union to listen to its proposals and to make a reasonable effort to achieve an accord.

The subjects for mandatory mutual consideration are defined in Section 6 merely by reference to "rates of pay, rules, or working conditions."[41] But the courts have ratified the practice of the industry so that the duty to bargain "generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States."[42] That is, "what carriers must legally bargain about is affected by what is in fact bargained about in the railroad world."[43]

The scope of bargainability is extremely broad. The recent guidepost opinion in *Order of Railroad Telegraphers* v. *Chicago & Nw. Ry.*, *supra* note 31, 362 U. S. at 338 (1960) states:

> In an effort to prevent a disruption and stoppage of interstate commerce, the trend of legislation affecting railroads and railroad employees has been to broaden, not narrow, the scope of subjects about which workers and railroads may or must negotiate and bargain collectively. Furthermore, the whole idea of what is bargainable has been greatly affected by the practices and customs of the railroads and their employees them-

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[40] *Accord*, Elgin, J. & E. Ry. v. Burley, *supra* note 35, 325 U.S. at 724-25 (1945).

[41] *See also* 45 U.S.C. § 152, Seventh (1964).

[42] Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 346 (1944).

[43] United Indus. Workers of Seafarers Int'l Union v. Board of Trustees of Galveston Wharves, 351 F. 2d 183, 191 (5th Cir. 1965).

> selves. It is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees as well as the interests of the railroad and the public at large.[44]

The court upheld the right to strike to compel bargaining on a proposed work rule change to prevent the carrier from abolishing positions in existence before a certain date. The court rejected the carrier's contention that the proposal was not part of a legitimate "labor dispute" because it sought to perpetuate "wasteful" and "unnecessary" jobs.

The scope of "work rules" discussed by railroads and unions over the past century, including the use of firemen and the manning of trains,[45] has greatly exceeded what a layman might expect the term to include. Bargaining in the rail industry has comprehended fields frequently reserved to management in other industrial contexts. Not until the railroads began to experience the pressure of advancing technology and vigorous competition from other modes of transportation after the Second World War was there any suggestion that some questions of mutual interest might be beyond the pale of required bargaining. Increasingly, the roads have come to use the allegation of non-bargainability, and have sought judicial rulings to protect managerial discretion.[46] Rarely have the courts sanctioned this technique, and recent pronouncements do not augur well for its encouragement.

This setting bids us be chary of the conclusion of the District Court that there was no bargainability in Notice No. 1 which proposed that for the future the parties establish work rules different from those prescribed by the

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[44] *Cf.* Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 209-15 (1964).

[45] *See* H.R. Rep. No. 713, 88th Cong., 1st Sess. 6 (1963); Comment, *The Railway Work Rules Dispute—A Precedent for Compulsory Arbitration*, 14 DE PAUL L. REV. 115, 119-20 (1964). *See also* Brotherhood of Locomotive Engineers v. Chicago, Rock I. & Pac. R.R., *supra* note 4, 382 U.S. at 429.

[46] See the excellent discussion in Weber, *Public Policy and the Scope of Collective Bargaining*, 13 LAB. L.J. 49 (1962).

Award for a two-year period. The court stated that Notice No. 1 "demands the restoration of firemen on those runs for which Award 282 expressly held firemen were unnecessary. Obviously, compliance with this notice would be a consent to abrogate and do away with the outcome of the arbitration." [47] The District Court gave no clue as to how in its opinion a Section 6 notice could validly propose changes in the work rules established by the Award, by what method, and to what extent.

In our view its conclusion was erroneous. The crisis conditions of 1963 evoked an unusual response from Congress, but one not intended to displace totally the framework of labor relations law and practice in the field. The phrasing of Public Law 88-108 and the reports that accompanied it make clear that Congress in its controlled response did not intend to effect a permanent alteration in development of collective bargaining. The preamble set the tone of the statute, declaring that "it is desirable to achieve [the protection of the national interest] in a manner which preserves and prefers solutions reached through collective bargaining. . . ." According to Section 8, the statute expired of its own terms one-hundred and eighty days after enactment. The Award of the Arbitration Board, by virtue of Section 4, could not "exceed two years from the date the award takes effect, unless the parties agree otherwise." Section IV of the Award itself reiterated the limited duration of the terms imposed and specified it would be in force for two years "unless the parties agree otherwise."

This dual theme of limited survival and contractual freedom infuses a proper resolution of this case, and does so with a spirit that is frustrated by the District Court's conclusions of non-bargainability (and indeed of prematurity). In providing in Section 3 of the law that the Award would be "binding on both the carrier and organization parties" and constitute a "complete and final disposition" of the major issues, Congress meant only that the Board's conclusions were to have the status of arbitration awards in the classic sense, not merely of mediation suggestions or

[47] Bangor & A.R.R. v. Brotherhood of Locomotive Firemen, *supra* note 38, 253 F. Supp. at 688.

fact-finding as in the ordinary major dispute under the Railway Labor Act. But Congress contemplated and intended that the parties could continue to work out a settlement different from that imposed by the Board to be effective for a limited two-year period. In submitting the Administration draft to Congress, "President Kennedy repeatedly emphasized to the Congress his hope that the dispute could eventually be settled by collective bargaining." *Brotherhood of Locomotive Engineers* v. *Chicago, Rock I. & Pac. R.R., supra* note 4, 382 U.S. at 431. The President "expressed no desire to have Congress pass a law that would finally and completely dispose of the problem," observing that it would be " 'wholly inappropriate to make general and permanent changes in our labor relations statutes. . . .' " *Id.* at 432. And the Congress "enacted the bill proposed by the President" with but "one significant change" not relevant here. *Ibid.*

Congress emphasized in unambiguous terms that the parties were not to be locked in by the terms of the Award on the firemen and crew consist issues:

> It should be especially noted that, although the joint resolution provides for arbitration on these two issues, the parties may still bargain collectively on these issues, and resolve them among themselves. This process may take place before the arbitration board is established; after the board has initiated its proceedings; and may also take place after the board has made an award. By agreement, the parties may make the appointment of the board unnecessary; may make the decision of the board unnecessary; *and may supersede the decision of the board—all through collective bargaining.* H.R. Rep. No. 713, 88th Cong., 1st Sess. 13 (1963). (Emphasis added.)

We find it impossible to accommodate the operative language and animating philosophy of Public Law 88-108 with the District Court's holding that Notice No. 1 was nonbargainable. The carriers argue now that the District Court did not foreclose all possibility of altering the rules imposed by the Board, but meant only to vindicate its efforts

by precluding return to the status quo ante. Even if we agreed that the BLFE's Notice No. 1 would have that effect,[48] nothing we detect forbids proposing just such a complete regression. At least, we hold that under the Railway Labor Act, and after taking into account such qualification of that law as is fairly implied from Public Law 88-108, the BLFE could legitimately require that the carriers negotiate about these proposals for work rules to be operative in the future.

Nothing compels the carriers to accede totally to changes proposed in Notice No. 1, and indeed in light of the realities of collective bargaining it is unlikely that the BLFE expects to insist on complete acceptance of its suggestions. But certainly there was no disability prohibiting the opener that the BLFE included in its first notice.

Notice No. 2, however, falls in a different category. It did not propose certain rule changes to govern the future operation of the railroads. It was aimed directly and undeniably at vitiating the Award of the Arbitration Board, an Award that has long since received judicial confirmance and been fully implemented by the parties. Although Notice No. 2 expressly refers to Section 6 of the Railway Labor Act, the notice on its face demonstrates the irrelevance of Section 6, and the "major disputes" provisions of the Railway Labor Act in general.

Notice No. 2 explicitly proposed that "employees whose employment and seniority were terminated by the application or misapplication of the Award of Arbitration Board 282 will, on [the expiration of the Award as extended by stipulation], be recalled and restored to the seniority roster and employed with their original seniority date and used as firemen (helpers). . . ." In subsequent sections, the notice proposed that employees terminated in the course of implementing Award 282 be reimbursed for monetary loss due to the termination and deprivation of seniority, including expenses incurred for meals, travel, lodging, and change of residence when relocating for other assignments.

[48] I note, however, that apparently 6000 fewer firemen would have been required under the proposed rules than the National Diesel Agreement had provided.

These proposals relate to alleged past grievances. We are concerned here with bargainability, and instinct in the essence of collective bargaining is a notion of mutality, that if a subject is brought up each side has at least the authority both to offer and to concede.

What is the status of the union concerning the subject it proposed for bargaining in Notice No. 2? We turn to *Elgin, J. & E. Ry.* v. *Burley, supra* note 35, 325 U.S. at 739:

> To settle for the future alone, without reference to or effect upon the past, is in fact to bargain collectively, that is, to make a collective agreement. That authority is conferred independently of the power to deal with grievances, as part of the power to contract "concerning rates of pay, rules, or working conditions." It includes the power to make a new agreement settling for the future a dispute concerning the coverage or meaning of a preexisting collective agreement. For the collective bargaining power is not exhausted by being once exercised; it covers changing the terms of an existing agreement as well as making one in the first place.
>
> But it does not cover changing them with retroactive effects upon accrued rights or claims. For it is precisely the difference between making settlements effective only for the future and making them effective retroactively to conclude rights claimed as having already accrued which marks the statutory boundary between collective bargaining and the settlement of grievances.

The Court held that a union had no lawful authority to bargain for some of its members in settling claims they asserted against the railroad arising from the application of new work rules. The court observed that the railroad was not entitled to assume from the union's status as bargaining agent that it had the right to settle claims for past grievances, and that any agreements reached were without legal significance.

This analysis has an immediate bearing on our situation.

The BLFE proposed that the carriers jettison the rights that had accrued to them under the Award, for the Notice by its terms is limited to rehiring and reimbursing those employees terminated in implementing Award 282. If Award 282 meant anything it provided the sanction of Congress for the railroads' authority to discharge thousands of firemen. This permission was sharply narrowed by stringent protective provisions under which severed employees have already received many millions of dollars in benefits. The rights to these payments vested when the employees were discharged pursuant to the Award. The BLFE Notice proposed that the carriers renounce their vested rights. But the bargainability of this subject matter as a proposal for a change in "work rules" is undercut by the fact that the *Elgin* case squarely denies the BLFE any warrant in law to "bargain" over any possible concession on the employee's side to make a refund, or even partial refund, of any severance benefits already vested or paid. Clearly a proposal that cannot lawfully be adopted is non-bargainable.[49] Since the union could not bargain away any part of the rights that accrued to employees under the Award, it could not compel the railroads to bargain on a proposal that they surrender rights that accrued to the carriers under the Award, which defined and limited the liability of the carriers arising from changes made in accordance with the Award.

In Notice No. 2 the union claimed there had been misapplication of the award. As to this it suffices to point out that Section 8 of the Railway Labor Act[50] and Section 4 of Public Law 88-108 permit the union to bring forward, questions of interpretation as to the scope and applicability of the Award for resolution by Board 282.[51] But these would not be comprehended by Section 6 of the Railway Labor Act, governing proposed changes in work rules,

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[49] *See* Southern Pac. Co. v. Switchmen's Union of North America, *supra* note 33, 356 F. 2d at 334-35.

[50] 45 U.S.C. § 158(m) (1964).

[51] *See* Brotherhood of Railroad Trainmen v. Terminal R.R. Ass'n, —— U.S.App.D.C. ——, —— F. 2d —— (No. 20135), decided this day.

classified as major disputes.[52] The rest of Notice No. 2 is inherently an attack on the fairness of the Award—and that is not bargainable under Section 6 consistently with the purpose of Public Law 88-108, and the Award thereunder and its judicial confirmance.

* * * * *

It is our hope and contemplation that any further litigation will be conducted with a fresh outlook. The halls of justice should not be an arena where gladiators are spurred on in desperate combat. They provide a forum where legal disputes can be settled, with a minimum of rancor, so as to further the Congressional objective of agreement and, if possible, harmony between carriers and unions.[53]

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[52] The BLFE contends in its brief that there is nothing wrong with retroactive contract proposals and agreements, and suggests that they are used frequently in industrial relations. Whatever may be the general practice, and regardless of what other provisions of the Railway Labor Act may require, there is no duty to bargain collectiyely over the settlement of past grievances that is imposed by Section 6.

[53] This court's opinions in the instant cases will undoubtedly have bearing on others arising in one way or other out of Award 282.

Before the present division are ten cases, Nos. 20152, 20158, 20172, 20191, 20192, 20193, 20215, 20216, 20229 and 20249.

Before the instant division also is No. 20316, decided today.

Previously argued before Judges Bastian, Burger and Wright are five cases, Nos. 19867, 20003, 20004, 20212 and 20213.

Case No. 20135, decided today, came before Chief Judge Bazelon, Senior Circuit Judge Edgerton and Circuit Judge Coffin, (of the First Circuit, sitting by designation).

Hitherto in the District Court, cases involving the railway work rules disputes have been referred to a single District Judge. The fact that we have differed from him in some aspects of relief granted or of the basis of rulings should not be permitted to obscure our appreciation for the prodigious effort he has made in response to so difficult an assignment, and for the commendable manner in which he has approached so many novel and complex questions.

In today's text we have undertaken definition of the basic legal principles applicable to future consideration of the issues. It would seem that sound judicial administration of the District Court's business will be served by rotation of this assignment at this juncture. We have in mind avoidance of further burdening of this District Judge and the broad-

The parties are directed to submit within 10 days a proposed judgment, and to confer and endeavor to agree thereon. At that time the parties may also request supplemental rulings on any matters that have not been discussed in this opinion.

Affirmed in part,
reversed in part.

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ening of application of pertinent judicial expertise and exposure in meeting our common problems in this area. So it is that we have ourselves achieved some distribution of the workload, and we regretfully assume that there may yet be heavy demands on judicial manpower in the District Court by reason of railroad work rules controversies.

Appendix

Public Law 88-108

Act of August 28, 1963, 77 Stat. 132.

Whereas the labor dispute between the carriers represented by the Eastern, Western, and Southeastern Carriers' Conference Committees and certain of their employees represented by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America, labor organizations, threatens essential transportation services of the Nation; and

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained; and

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not resulted in settlement of the dispute; and

Whereas the Congress find that emergency measures are essential to security and continuity of transportation services by such carriers; and

Whereas it is desirable to achieve the above objectives in a manner which preserves and prefers solutions reached through collective bargaining; and

Whereas, on August 2, 1963, the Secretary of Labor submitted to the carrier and organization representatives certain suggestions as a basis of negotiation for disposition of the fireman (helper) and crew consist issues in the dispute and thereupon through such negotiations tentative agreement was reached with respect to portions of such suggestions; and

Whereas, on August 16, 1963, the carrier parties to the dispute accepted and the organization parties to the dispute accepted with certain reservations the Secretary of Labor's suggestion that the fireman (helper) and crew consist issues be resolved by binding arbitration but the said parties have been unable to agree upon the terms and procedures of an arbitration agreement: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That no carrier which served the notices of November 2, 1959, and no labor organization which received such notices or served the labor organization notices of September 7, 1960, shall make any change except by agreement, or pursuant to an arbitration award as hereinafter provided, in rates of pay, rules, or working conditions encompassed by any of such notices, or engage in any strike or lockout over any dispute arising from any of such notices. Any action heretofore taken which would be prohibited by the foregoing sentence shall be forthwith rescinded and the status existing immediately prior to such action restored.

Sec. 2. There is hereby established an arbitration board to consist of seven members. The representatives of the carrier and organization parties to the aforesaid dispute are hereby directed, respectively, within five days after the enactment hereof each to name two persons to serve as members of such arbitration board. The four members thus chosen shall select three additional members. The seven members shall then elect a chairman. If the members chosen by the parties shall fail to name one or more of the additional three members within ten days, such additional members shall be named by the President. If either party fails to name a member or members to the arbitration board within the five days provided, the President shall name such member or members in lieu of such party and shall also name the additional three members necessary to constitute a board of seven members, all within ten days after the date of enactment of this joint resolution. Notwithstanding any other provision of law, the National Mediation Board is authorized and directed: (1) to compensate the arbitrators not named by the parties at a rate not in excess of $100 for each day together with necessary travel and subsistence expenses, and (2) to provide such services and facilities as may be necessary and appropriate in carrying out the purposes of this joint resolution.

Sec. 3. Promptly upon the completion of the naming of the arbitration board the Secretary of Labor shall furnish to the board and to the parties to the dispute copies of

his statement to the parties of August 2, 1963, and the papers therewith submitted to the parties, together with memorandums and such other data as the board may request setting forth the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement. The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve the matters on which the parties were not in agreement, and shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration.

Sec. 4. To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act. The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed, and the arbitration board shall report to the National Mediation Board in the same manner as arbitration boards functioning pursuant to the Railway Labor Act. The award shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise.

Sec. 5. The arbitration board shall begin its hearings thirty days after the enactment of this joint resolution

or on such earlier date as the parties to the dispute and the board may agree upon and shall make and file its award not later than ninety days after the enactment of this joint resolution: *Provided, however,* That said award shall not become effective until sixty days after the filing of the award.

Sec. 6. The parties to the disputes arising from the aforesaid notices shall immediately resume collective bargaining with respect to all issues raised in the notices of November 2, 1959, and September 7, 1960, not to be disposed of by arbitration under section 3 of this joint resolution and shall exert every reasonable effort to resolve such issues by agreement. The Secretary of Labor and the National Mediation Board are hereby directed to give all reasonable assistance to the parties and to engage in mediatory action directed toward promoting such agreement.

Sec. 7. (a) In making any award under this joint resolution the arbitration board established under section 2 shall give due consideration to the effect of the proposed award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation.

(b) The obligations imposed by this joint resolution, upon suit by the Attorney General, shall be enforcible through such orders as may be necessary by any court of the United States having jurisdiction of any of the parties.

Sec. 8. This joint resolution shall expire one hundred and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence.

Sec. 9. If any provision of this joint resolution or the application thereof is held invalid, the remainder of this joint resolution and the application of such provision to other parties or in other circumstances not held invalid shall not be affected thereby.

Approved August 28, 1963.

APPENDIX C

Appeals from the United States District Court for the District of Columbia

Supplemental Opinion Filed July 31, 1967

Mr. Milton Kramer was on the brief for appellants in Nos. 20,152, 20,229 and 20,249 and appellees in No. 20,172.

Mr. James D. Hill for appellant in No. 20,158 and appellee in No. 20,191.

Mr. Joseph L. Rauh, Jr., with whom *Messrs. John Silard, Daniel H. Pollitt, Isaac N. Groner, David Epstein* and *Stephen E. Moss*, were on the brief for appellant in Nos. 20,192 and 20,193 and appellee in Nos. 20,215 and 20,216.

Mr. Francis M. Shea, with whom *Mr. Richard T. Conway* was on the brief for appellants in Nos. 20,172, 20,191, 20,215 and 20,216 and appellees in Nos. 20,152, 20,158, 20,192, 20,193, 20,229 and 20,249. *Messrs. David Booth Beers* and *Ralph J. Moore, Jr.*, also entered appearances for appellants in Nos. 20,215 and 20,216.

Before DANAHER, *Circuit Judge*, BASTIAN, *Senior Circuit Judge*, and LEVENTHAL, *Circuit Judge*.

SUPPLEMENTAL OPINION

LEVENTHAL, *Circuit Judge:* On May 12, 1967, this court released its opinion disposing of many of the legal questions arising from the railway work rules disputes and the compulsory arbitration statute passed by Congress in 1963 to handle the controversies. Because of the number and complexity of the issues, we directed the parties to confer in an effort to propose a judgment embodying our rulings, and invited them to request supplemental rulings on any points not explicitly covered by our opinion.

The parties have submitted numerous requests for supplemental rulings, for reconsideration, and for clarification.

I *The New Plateau Work Rules Continuing In Effect*

A. Brotherhood of Railroad Trainmen (BRT)

The carriers contend that our "new plateau" rationale, holding that the substantive terms effected by Award 282 continue in force after the formal expiration date of the Award until changed pursuant to the Railway Labor Act, logically requires reversal of the District Court's ruling that the procedures established by Award 282 for special arbitration awards on the trainmen issue lapsed at the termination of the Award. We disagree.

Our decision rests on an accommodation of the sometimes divergent directives of Public Law 88-108, Award 282, and the Railway Labor Act. Throughout, our touchstone has been our understanding of dominant Congressional intention. We viewed Congressional intervention in 1963 as reflecting a sensitivity to the dangers of imposing drastic changes on the pattern of railway labor collective bargaining.

The point is simply this: We think Congress meant that changes in substantive work rules issuing forth after the expiration of Award 282 should not be wrought by the compulsory edict of a board, but should either be reached by agreement of the parties or should be born out of their actions under the Railway Labor Act, an act which regulates their conduct of bargaining so as to promote the possibility of agreement, with the assistance of the National Mediation Board or other special boards.

This dominant Congressional intention means that a difference must be drawn between those actions of Board 282 and its agents prior to the expiration date of Award 282 which effected changes in substantive work rules, and those actions which merely constituted issuance of procedures for promulgating future changes in substantive work rules. The completed changes in substantive work rules continue on—unless and until changed again in accordance with the Railway Labor Act. But there is no continuance of what are in effect only procedures for issuing future changes in substantive work rules.

Those procedures constituted a special mechanism for

making changes by award, and were intended to have only a two-year life. Upon the expiration of the two-year period the special machinery was exhausted and in the absence of agreement only the system of the Railway Labor Act was available for future changes in substantive work rules. Consequently, in the absence of ratification by agreement of the parties, a local adjustment board had no independent legal authority that would permit it to achieve an alteration in substantive work rules subsequent to the expiration of the two-year period.

B. Brotherhood of Locomotive Firemen and Enginemen (BLFE)

The parties are in disagreement as to the import for the Firemen of our ruling as to the Trainmen, a ruling announced in our May 12 opinion and adhered to on reconsideration for the reasons noted above.

On the firemen issue, Board 282 decided that most firemen could be dispensed with for other than steam power engines. It developed a procedure permitting the "blanking" of firemen positions as follows: Each carrier could list those engine crews on which it thought firemen unnecessary for reasons of safety or workload. These positions could then be blanked, except that each local union chairman was given the right within 30 days of receipt of the carrier's list to designate up to ten percent of these crews as requiring continued employment of firemen. The Award refers to this right to designation as based upon considerations of safety, undue work burden and adequate and safe service to the public, but provided that the designation shall not be subject to challenge or review. This procedure was designed to take place at three month intervals.

A dispute arose when it came time to decide what happened to this procedure, and the results it had reaped, when Award 282 expired.

The carriers insisted that when Award 282 expired the procedures continued in effect as part of the new plateau of work rules, and constituted a continuing mechanism for reducing the employment of firemen unless and until

changed in accordance with Section 6 of the Railway Labor Act. The BLFE argued both that this procedure passed out of existence when the Award terminated, and that the changes it had effected lapsed, so that positions blanked during the life of the Award were resurrected. The District Court ruled that a "new plateau" had been created that preserved what had been accomplished by the carriers under the Award in reducing firemen's positions, but held that the carriers could no longer resort to the machinery created by the Award to make further job cuts. The District Court concluded, however, that the carriers were prevented only from taking "affirmative acts" in reliance on the Award, but explained that this did not prevent the carriers from refusing to fill vacancies resulting from natural attrition. The underlying premise of that court's decision was that Award 282 superseded the requirements of the National Diesel Agreement which would otherwise demand the use of firemen on all locomotives.

As set forth in our May 12 opinion, this court has rejected, though for somewhat different reasons, the contention of the BLFE that after March 30, 1966, the *status quo ante* compulsory arbitration was automatically restored. While we explicitly ruled that the procedure created by the Board for making new crew consist rules expired when the Award did, we did not previously examine the problem presented in the firemen context.

The BLFE insists that there is no tenable distinction whereby firemen should be subject to continuing reductions under the Award though trainmen are not similarly affected. The carriers concede that it is difficult to distinguish the two situations, but suggest that the Award might be viewed as merely setting forth a procedure for crew consist changes but as directly affecting the firemen rules.

Once again we find both parties somewhat out of alignment with our basic premises. We have endeavored to make it clear that nothing of the Award survived its expiration date. It is the work rules resulting from the Award that endure, by virtue of the Railway Labor Act; they are deemed to be incorporated into the prior agreements of the parties that themselves endure by virtue of the

Railway Labor Act unless and until changed in accordance with that statute. We must therefore discern what "work rules" were put into effect under and prior to the expiration of Award 282.

The Award did not dispense with the use of firemen. It began by continuing in force all "agreements, rules, regulations, interpretations, and practices, however established," except as modified by the Award. The Award provided procedures whereby the carriers could mark firemen jobs for extinction, and also established a reciprocal power in the local BLFE chairman to immunize from elimination ten percent of the crews listed. The Opinion of the Neutral Members of Board 282 makes abundantly clear that the Board recognized that the Award had the effect only of sanctioning a procedure of limited duration for accomplishing a reduction in crew consist and the use of firemen. The Board explained that it was conscious that the immediate impact of the Award might be small, but that this was a deliberate choice reflecting concern for the human factor in the equation and the goal that the Award would establish some principles that could contribute to a final solution to the problems:

> The Board's award will remain in force only two years. Within that time the effect of attrition may be such that the number of firemen or train crew jobs actually eliminated may be comparatively small. *Opinion of Neutral Members,* 41 LAB. ARB. 680, 681.

The Board members themselves characterized what they did as having "established a *procedure* for determining whether, considering safety, workload, and adequacy of transportation service, particular jobs should be made subject to elimination." (p. 681) (Emphasis added). In explaining why the Award provided that the union could insist on saving ten per cent of the jobs marked for elimination, the Neutral Members reasoned that this procedure would obviate the possibility of objections, based on safety or convenience, to individual proposals for job reduction. The underlying premise, as explicated by the Board, was that the Award would be able to authorize such reductions

only during two years, and unless an efficient procedure were provided for making specific decisions "the likelihood of reducing [the number of disputes over individual jobs] significantly in a two-year period would not be very great." (p. 690). Because of the two-year limitation on the Award, the Board doubted that any standards it might prescribe could be applied in particular disputes "in sufficient time to yield any significant results." (p. 690).

As the event turned out the carriers used the Award's procedures to terminate many more firemen jobs than the Board predicted.[1] The Neutral Members' underestimate does not undercut but rather underlines the view that the mechanics for reduction in firemen jobs were procedures of necessarily limited duration, rather than work rules with continuing vitality.

Our conclusion is that the provisions in the Award for establishing new firemen levels did not constitute "work rules" in the classic sense, as we have used and applied that term, but instead are more accurately described as procedures for establishing new work rules. The history of labor relations agreements in this industry reveals that the manning work rules were expressed in terms of ultimate results, like one-conductor-and-three-brakemen, or firemen-required-on-all-freight-locomotives, and were not formulated in terms of a methodological approach. This practical construction of the concept of work rules is reinforced by the Board's expressions treating the mechanics of lists and designations as procedures. Accordingly, for purposes of determining what "work rules" were in force on the last day of the life of Award 282, we do not con-

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[1] In the course of Congressional testimony, Chairman Ralph Seward of Board 282 and Assistant Secretary of Labor James Reynolds indicated that their original expectation was that the procedures would lead to a reduction of about 5500 jobs, rather than the 18000 the carriers succeeded in blanking. *See Hearings on the Administration of Public Law 88-108 Before the Senate Comm. on Commerce,* 89th Cong., 1st Sess., ser. 89-45 at 363-64, 465-66 (1965). And according to Senator McGee, the number of firemen eliminated also exceeded the expectations of "Members of the U.S. Senate." *Hearings on the Administration of Public Law 88-108 Before the Senate Comm. on Commerce,* 89th Cong., 2d Sess., ser. 89-56, at 1030 (1966).

sider the procedures provided by the Award for changing job requirements as being themselves part of the substantive "work rules." These procedures, like the procedures for changing substantive work rules for crew consist of trainmen, had no effectiveness after the expiration of the Award.

This construction also gives what we consider the appropriate effect to the undeniably significant provisions in Public Law 88-108 and Award 282 that limited the effectiveness of the Award to two years. Since the Award did not become effective for sixty days after filing, the parties had more than two full years to plan its implementation. The pre-existing work rules, contained in the National Diesel Agreement of 1950, stipulated that "A fireman, or a helper, taken from the seniority ranks of the firemen, shall be employed on all locomotives." Award 282 continued this requirement (and any others stemming from agreement or practice), until changed in accordance with the Award. For two years plus, the carriers had the machinery for proposing, at three month intervals, the crews that they thought could safely and efficiently dispense with firemen positions. The fruits of these notices and negotiations, after adjustment for the Union's ten percent retention, effected what must be regarded as new "rules" applicable to the particular runs involved. But when the Award expired, so did the procedures it suggested. What survives is the complex of work rules in force on the last day prescribing the substantive terms that controlled the use of firemen on individual runs.

In consequence, a carrier is not only prevented from taking "affirmative acts" under the Award to reduce the use of firemen, as the District Court properly held, but also, if the carrier was required to keep a fireman on a particular crew as of the last day of the Award, it cannot thereafter change the work rule by discontinuing that position, except by agreement or in accordance with Section 6. The work rule that continues in force provides for a fireman on this crew, and that is not changed because the particular fireman on duty dies or retires.

Conversely, however, if the work rule in effect on the last

day of the Award provided that a fireman was not required for a particular engine crew—because that crew was included on the carrier's list of proposed blankable jobs and the union's local chairman did not designate it for retention of a fireman, within the ten percent of crews he could control—the work rule does not require a fireman on that crew even though for one reason or another the carrier had not removed or transferred that fireman by the end of the effective period of the Award.[2] The carrier may thereafter transfer him, or refuse to replace him when he dies or retires. Such action would not constitute a change in work rules but simply an action in accordance with the work rule in force on the critical date, a rule which provided that no fireman was required for that crew.

The National Diesel Agreement was not set aside by the Board. As already noted, the opening section of the Award provided that agreements in force continued in effect except as they were modified by the Award. The Award provided a procedure for modifications during the two-year life of the Award. We recognize that it may be turning back the clock to an era that two presidential boards and the Neutral Members of Board 282 have agreed is technologically outdated, but taking into account the structure of Award 282 as issued, we see no alternative to holding that any new runs created after Award 282 are subject to the National Diesel Agreement, and its requirement of a fireman on each engine crew.

Moreover, the National Diesel Agreement is in effect even though the only reason why a change in its work rule was not made under the Award during its life time was the fact that the change was blocked by a state's full crew law. The Supreme Court has expressly held that while such state law was in effect the Board had no capacity to make a change contrary to its provisions. *See Brotherhood of Locomotive Engineers* v. *Chicago, Rock I. & Pac. R. R.*, 382 U.S. 423 (1966). The opening sections of the

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[2] The work rules effectuating the changes made under the Award included the ancillary protective provisions of Part II.C for individuals transferred or separated in implementing the change. These work rules continued in effect after the Award.

Award dealing with the use of firemen and with crew consists provided for the continuation of work rules, however established, unless changed pursuant to the Award. The repeal of a full crew law subsequent to the expiration of Award 282 came after expiration of the Board's authority under the temporary statute and after expiration of the power of a carrier to invoke the procedures of the Award.

II *Validity of Awards Made January 25, 1966.*

In one respect we have decided to grant reconsideration and modify our opinion as requested by the carriers. In our opinion of May 12, we held that Award 282 was no longer in existence on January 25, 1966, when a special adjustment board rendered crew consist awards between the BRT and two carriers, and that therefore these awards were without legal significance.

We rejected by implication the carriers' argument in brief that the BRT had stipulated to the contrary. On rehearing the carriers point out decisions interpreting statutory provisions that an act be done within a specified period from the date of another action or event so that the initial or trigger date is excluded from the computation. As we were aware, that is of course the modern doctrine and is established by the decisions of this court among others.[3] It is the rule adopted by Rule 6 of the Federal Rules of Civil Procedure. We thought this rule inapplicable because the starting date did not involve problems of a fractional day, and was in turn determined by a still earlier computation beginning with an initial date that was concededly excluded from computation. This led us to the view that the two-year period prescribed by the Act as the life of the Award did not extend beyond 731 full days (two years of 365 days each, plus February 29, 1964), and that the Award which started at 12:01 a.m. on January 25, 1964, should not be stretched to include the 732nd day of January 25, 1966. We felt that

[3] *E.g.*, Freeman v. Pew, 61 App. D.C. 223, 59 F. 2d 1037 (1932); Burnet v. Willingham Loan & Trust Co., 282 U.S. 437, 439-40 (1931); Prince v. United States, 185 F. Supp. 269, 271-272 (E.D. Wis. 1960).

in the peculiar setting of this law that legislative consideration should prevail over the customary formula for computing time.

On further reflection, we think that while this analysis may be sound for an appraisal of the problem in the first instance, a doctrine not adverted to by the parties preempts the question. There is hornbook learning to the effect that where there is doubtful language in a statute for performance of an act, the courts prefer that which will confirm rather than destroy any bona fide transaction or title. 52 AM. JUR. *Time* § 18 (1944). This is powerfully underscored by the doctrine, highly relevant to modern needs, that where statutes have been entrusted to administrative agencies for implementation, their construction should be given effect unless plainly unreasonable or in conflict with the plain intent of the legislature.

Board 282 was keenly aware of the problems it faced in possessing only temporary authority. It purposefully selected a standard for the manning rule for firemen that could practicably be administered within that limited time. When the special board assumed that it had the authority to act on January 25, 1966, it must be presumed to have considered the question carefully and with a view to conforming to the intent of Congress as nearly as it could discern that intent.

We note that the Union did not promptly protest the awards as untimely. And further indication that even the Union regarded the time question as at least doubtful appears from the fact that their notices used a January 26, 1966 date as the effective date for proposed changes. We acquiesce in the interpretation of this doubtful question by the special board involved, since we cannot say this interpretation was unreasonable or violated any plainly ascertainable legislative intent. Accordingly we honor the board's conclusion that January 25, 1966 was the final day of the Award, and hold that the special arbitration awards rendered on that date were effective.

III *Applicability of Section 8 of the Norris-La Guardia Act.*

A. Brotherhood of Railroad Trainmen (BRT)

Appellant Union seeks a ruling that even assuming the District Court had jurisdiction to issue a restraining order, the issuance of the order reflected error in this case.

We are clear that the District Court was correct in holding that it had jurisdiction to enjoin a violation of the Railway Labor Act, and that this jurisdiction was not negatived by or subject to Section 4 of the Norris-La Guardia Act. We affirmed that conclusion in No. 20316, and fully adhere to that ruling.

Although the District Court had jurisdiction to issue the restraining order we think it erred in doing so because—as we subsequently held in our May 12, 1967 ruling—the complainant carriers had failed to comply with their obligations under the Railway Labor Act. Section 8 of the Norris-La Guardia Act, 29 U.S.C. § 108 (1964), provides that a federal court shall not grant a restraining order or injunction in a labor dispute where the complainant "has failed to comply with any obligation imposed by law which is involved in the labor dispute in question."

The issuance of the restraining order was conditioned on the carriers' posting a bond to make good damages, not to exceed $10,000, sustained by any party wrongfully restrained. We think the Union, which had to obey the injunction or suffer penalties for contempt of court, is entitled to a ruling from this court that vacates an erroneous determination of the District Court, although of course we do not purport to describe what if anything the Union is entitled to collect on the bond.

The District Court erred in concluding that because it held, correctly, that the action was not subject to Section 4 of the Norris-La Guardia Act, which would have ousted the court of jurisdiction, it necessarily followed that the "clean hands" provision of Section 8 of the Norris-La Guardia Act was likewise wholly inapplicable. The Supreme Court has said, speaking through the Chief Justice, that "there must be an accommodation" of this Act with the Railway Labor

Act. *Brotherhood of Railroad Trainmen* v. *Chicago R. & Ind. R.R.*, 353 U.S. 30, 40 (1957). That principle of accommodation means that actions to enjoin violations of the Railway Labor Act may be maintained without regard to Section 4 of the Norris-La Guardia Act, and yet be subject to Section 8 of that Act. That is the conclusion of other courts which have considered the matter,[4] and we agree. The point is, simply, that Congress did contemplate actions to effectuate the Railway Labor Act by enjoining violations.[5] That purpose would be utterly defeated if the federal court actions involved were subject to Section 4 of the Norris-La Guardia Act, which had provisions for withholding injunctions in labor disputes reflecting entirely different objectives.

On the other hand a ruling that Section 8 of the Norris-La Guardia Act is applicable to actions to enjoin violations of the Railway Labor Act would not trammel but would rather further the effectuation of that Railway Labor Act, for it ensures compliance by complainant carrier or union which cannot seek an injunction until and unless it has discharged the obligations imposed by the Railway Labor Act.

It may be that in a particular case the District Court might conclude that the imperatives of the Railway Labor Act override Section 8—a statutory focusing so to speak of an equity approach whereby lack of clean hands may be overcome by a balancing of interests, particularly where it is the public interest involved. In a particular case the District Court might conclude that the question of the applicability of Section 8 was doubtful, would require time to explore, and that the restraining order should issue forthwith to avoid jeopardizing the Railway Labor Act. Such

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[4] *See* Rutland Ry. v. Brotherhood of Locomotive Eng'rs, 307 F. 2d 21, 37-40 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); Chicago, Rock I. & Pac. R.R. v. Switchmen's Union, 292 F. 2d 61, 64-66 (2d Cir. 1961), *cert. denied*, 370 U.S. 936 (1962); Elgin, J. & E. Ry. v. Brotherhood of Railroad Trainmen, 302 F. 2d 540, 544-45 (7th Cir.), *cert. denied*, 371 U.S. 823 (1962); Manning v. American Airlines, Inc., 221 F. Supp. 301, 304-06 (S.D. N.Y. 1963); *cf.* Brotherhood of Railroad Trainmen v. Toledo P. & W.R.R., 321 U.S. 50, 60-65 (1944); Brotherhood of Railway Clerks v. Florida E. C. Ry., 384 U.S. 238, 247 n.8 (1966); Brotherhood of Railroad Carmen v. Chicago & Nw. Ry., 354 F. 2d 786, 794-76 (8th Cir. 1965).

[5] Virginian Ry. v. System Federation No. 40, 300 U.S. 515 (1937).

approaches would recognize that Section 8 of the Norris-La Guardia Act has some applicability, and is a legislative instruction that weighs heavier in the scale than the clean hands doctrine taken merely as a general equity maxim, yet is overborne by requirements of the Railway Labor Act. Here, however, the approach of the District Court was that Section 8 of the Norris-La Guardia Act was completely inapplicable and that was error. In saying that the restraining order was erroneously entered, however, we do not mean that would excuse a contemptuous violation.

We have said enough to demonstrate that the approach used by the District Court was erroneous. As we have decided, the complainants lack clean hands and the defendants were not threatening the violation. Therefore, we now rule that the District Court, taking all circumstances into consideration, should permit the Union to recover on the $10,000 bond if indeed it can establish that it sustained ascertainable damage from the issuance of the restraining order.

B. Order of Railway Conductors and Brakemen (ORCB)

This Union argues that, even assuming its notices of March 23, 1965 were premature (as held in our May 12 opinion), the temporary restraining order against the strike was invalid because Section 8 of the Norris-La Guardia Act prohibits the granting of a restraining order to a complainant "who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

Neither the unclean hands doctrine, nor its crystallization in Section 8 of the Norris-La Guardia Act, operates to deny relief to a complainant merely because it has declined to short-circuit the plan envisaged by Congress for obtaining a durable resolution of vexing questions. Congress contemplated that the parties would resume negotiation after they had garnered experience from actually living with the rules decided upon by the arbitrators after giving "due consideration to the effect . . . upon adequate and safe transportation service to the public and upon the interests of

the carrier and employees." (*See* Section 7(a) of Public Law 88-108.) The general requirement in Section 8 for reasonable efforts at negotiation does not contemplate a departure from the assumptions of a specific statutory plan. Therefore, entry of the restraining order was not improper.

* * * * *

The Unions have assumed that a full decree will be entered by this court. We think the proper course is to remand for the District Court to enter decrees in accordance with our rulings. We approve its approach on matters drawn into question except as indicated in our opinions.[6] The various judgments and decrees appealed from are accordingly vacated and the causes remanded for the entry of fresh decrees not inconsistent with our opinions.

So ordered.

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[6] We affirm both the reasoning and result reached by the District Court in construing the effect of the agreements entered into between the BRT and the Kansas City Southern Railway and Louisiana & Arkansas Railway, and the Wichita Terminal Association. We agree that the correspondence between the BRT and the Richmond, Fredericksburg & Potomac Railroad constituted a crew consist agreement of the same duration as an award by a special adjustment board.

We also approve the District Court's holding that Southern Railway Company and its subsidiaries were proper parties plaintiff in suits involving the ORCB and were covered by Award 282.

APPENDIX D

Before: DANAHER, Circuit Judge; BASTIAN, Senior Circuit Judge; and LEVENTHAL, Circuit Judge.

JUDGMENT

These causes came on for hearings on the records of the District Court and the briefs submitted by counsel, and were argued by counsel.

On May 12, 1967, this court filed an opinion in the above-captioned causes, and invited the parties to submit proposed judgments and to request supplemental rulings within ten days thereafter.

The railroads submitted proposed judgments, and requests for supplemental rulings, and filed petitions for rehearing. The unions also submitted proposed judgments and requests for supplemental rulings, and filed oppositions to the railroads' petitions for rehearing.

Upon consideration of the foregoing, it is.

ORDERED AND ADJUDGED by the Court that, except insofar as they are granted in the supplemental opinion filed this date, the aforesaid petitions for rehearing are denied; and it is

FURTHER ORDERED AND ADJUDGED by the Court that, insofar as reflected in the supplemental opinion filed this date, the requests for supplemental rulings are granted; and it is

FURTHER ORDERED AND ADJUDGED by the Court that these cases are remanded to the District Court with directions to vacate the orders and decrees appealed from herein and enter orders and decrees consistent with the opinion of this Court filed May 12, 1967, and the supplemental opinion filed this date.

Per Curiam.

APPENDIX E

Before: DANAHER, Circuit Judge; BASTIAN, Senior Circuit Judge; and LEVENTHAL, Circuit Judge, in Chambers.

MEMORANDUM AND ORDER

These cases were argued on cross-appeals filed by the Brotherhood of Locomotive Firemen and Enginemen (BLFE) in Nos. 20192 and 20193, and by the carriers, Bangor and Aroostook Railroad Co. et al, in Nos. 20215 and 20216.

This court rendered an opinion in these cases, and others consolidated therewith, on May 12, 1967, and filed a supplemental opinion on July 31, 1967.

The carriers filed a petition for rehearing and clarification on August 15, 1967, and on August 25, the BLFE filed a memorandum in opposition to that petition.

The carriers assert, among other things, that this court's opinion, and particularly its supplemental opinion, reflects a misunderstanding of the meaning and application of Award 282 intended by the Board of Arbitration (Board 282).

This court has determined that Board 282 has continuing vitality for deciding questions of interpretation as to the scope and application of the Award. (Opinion of May 12, 1967, pp. 39-40.) It has also made clear that even on a question where the Board did not have final authority, i.e. interpretation of the underlying statute, the court would accept the interpretation of the Board, even though contrary to the interpretation the court would itself have rendered, so long as the Board's interpretation was not unreasonable or contrary to ascertainable legislative intent. (Supplemental opinion of July 31, 1967, p. 15).

ACCORDINGLY, now upon consideration of the foregoing, of this court's opinions above cited, and on the record before the court,

It is ORDERED by the court that the carriers' petition of August 15, 1967 is denied, without prejudice however to the Board's seeking leave within thirty days from the date of this order to submit as amicus curiae a showing of

respects, if any there be, in which the opinions of this court are inconsistent with the understanding of Board 282 as to the proper meaning and applicability of its award. Issuance of the mandate will be stayed for thirty days.

It is FURTHER ORDERED that the court's supplemental opinion of July 31 be clarified by the addition of the following as a final paragraph of part I of the opinion (p. 13 of slip opinion).

"The carriers argue in effect that the Award at least authorized the carriers to blank firemen positions during the lifetime of the Award, with this personnel action remaining in a state of suspended animation until its vitalization upon repeal of the full crew law. The Court noted in Rock Island, supra, 382 U.S. at 423:

> Congress wanted to do as little as possible in solving the dispute which was before it, and we note that this dispute was not over the size of crews in States which had full-crew laws.

The Board authorized the carriers to list jobs for blanking, and thus provide a classification "when and if such full crew laws are amended or repealed." Answer of May 17, 1964, to Carriers' Question No. 5 under Section II—Part B(1) and B(2). But this conditional blanking was only available as an advance procedure made fruitful if the necessary condition materialized during the 2-year lifetime of the Award. *See Opinion of Neutral Members,* quoted *supra,* 41 LAB. ARB. at 681. The Board's energy was not limited to "the dispute which was before it [Congress]" at the passage of the law, but also extended to firemen manning disputes arising during the critical 2-year period. But the Board's order and interpretations cannot be stretched beyond the Congressional frame of reference to resolve academic differences or disputes that were neither in being at the time nor projected as arising during the 2-year period."

So ordered.

APPENDIX F

AWARD

This Award is made pursuant to Public Law 88-108, 88th Congress, S.J. Res. 102, enacted August 28, 1963.

The organization parties to the dispute named H. E. Gilbert and R. H. McDonald as organization members of this Arbitration Board. The carrier parties to the dispute named Guy W. Knight and J. E. Wolfe as carrier members of the Board. Benjamin Aaron, James J. Healy, and Ralph T. Seward were named as neutral members by the President.

On September 11, 1963, the Board met, elected its Chairman and adopted rules of procedure. On September 23, 1963, in accordance with Section 3 of the Joint Resolution, the Secretary of Labor furnished to the Board and to the parties to the dispute copies of his statement to the parties of August 2, 1963, together with memorandums setting forth his understanding of the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement.

Public hearings were held in Washington, D. C., on twenty-nine days between September 24 and November 2, 1963, at which witnesses were heard, exhibits introduced and arguments made. Rebuttal exhibits and written arguments were received on November 9, 1963.

On November 6 and 7, 1963, the neutral members of the Board, with the agreement of the parties, visited certain railroad yards in the Chicago area. The sole purpose of these visits was to assist the neutral members in understanding the evidence and arguments presented at the formal hearings and nothing said or shown to them during these visits was accepted as evidence.

During the course of the proceedings, questions arose as to whether certain carriers and certain of their employees were or properly should be parties to the dispute and subject to the board's jurisdiction. The carriers with regard to which such questions arose were the Union Railroad Company, the Florida East Coast Railway Company,

and the Elgin, Joliet & Eastern Railway Company. The Board declined to rule on these jurisdictional questions on the grounds that final determination of the Board's jurisdiction over any particular carrier and any particular group of employees could be made only by the courts and that time did not permit the Board to conduct the special proceedings required for such a determination. Nothing in this Award, however, and no action by the Board, including the reception into evidence of Carriers' Exhibit No. 1 or Employees' Rebuttal Exhibit No. 33, listing certain carriers as parties to the proceeding, is intended to prejudice the position of any carrier or any organization as to these jurisdictional questions.

The Board has incorporated in this Award any matters on which it found the parties were in agreement, has resolved the matters on which the parties were not in agreement, and has given due consideration to those matters on which the parties were in tentative agreement. Further, the Board has given due consideration to the effect of the Award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideraiton to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation.

After a full consideration of the evidence and arguments and upon the entire record, the Board makes a complete and final disposition of the issues submitted and finds and awards as follows.

I. Disposition of Section 6 Notices

Those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto are denied, except to the extent hereinafter provided.

II. Use of Firemen (Helpers) on Other Than Steam Power

Part A—Saving Clause

A(1). All agreements, rules, regulations, interpretations, and practices, however established, with respect to the employment of firemen (helpers) shall continue undisturbed except as modified by the terms of this Award.

Part B—Reductions in Jobs

B(1). Within 7 days following the effective date of this Award, each carrier covered by this Award shall have the right to give to each local chairman of the organization representing firemen (helpers) in each fireman (helper) seniority district a list of pool and regularly assigned freight engine crews (including pool and regularly assigned crews used in mixed, miscellaneous, and unclassified services) and a list of regularly assigned yard engine crews (including regularly assigned crews used in transfer, belt line, and miscellaneous yard services) then employed by the carrier in each such seniority district. The two lists shall include those engine crews which, in the carrier's judgment, based upon considerations of safety, undue work burden, and adequate and safe transportation service to the public, do not require the services of a fireman (helper).

B(2). Each local chairman, within 30 days of receipt of the carrier's lists, shall have the right, based upon considerations of safety, undue work burden, and adequate and safe transportation service to the public, to designate the engine crews in which the carrier shall be required to continued to use firemen (helpers); provided, that such designated crews shall not be more than 10 per cent of the freight engine crews, nor more than 10 per cent of the yard engine crews, in any seniority district, as such crews are listed by the carrier. Each local chairman's designation of crews to be operated with firemen (helpers), made as provided herein, shall be final and binding upon the parties in interest and shall not be subject to challenge or review; but prior conference shall be had between the parties in interest with respect to the crews to be so desig-

nated by the local chairman. The time and place for the beginning of such conferences shall be agreed upon within 10 days after the receipt of the carrier's lists by the local chairman, and said time shall be within 20 days after the receipt of the said lists.

B(3). At 3-month intervals following the date of the carrier's original lists, the carrier shall give to each local chairman lists of pool and regularly assigned freight engine crews and of regularly assigned yard engine crews which have been established or discontinued in each seniority district during the preceding 3 months and which meet the criteria set forth in paragraph B(1) of this Award; and the number of crews designated by the local chairman in which the carrier shall be required to use firemen (helpers) shall thereafter be adjusted, in the manner provided in paragraph B(2) of this Award; provided that not more than 10 per cent of the pool and regularly assigned freight engine crews nor more than 10 per cent of the regularly assigned yard engine crews, then employed by the carrier in any seniority district and included in either list, shall be designated as crews in which firemen (helpers) must be used.

B(4). Copies of all lists herein required to be furnished by the carrier to the local chairman shall be furnished to the general chairman of the organization involved.

B(5). After the expiration of 37 days following the effective date of this Award, the carrier shall not be required to use firemen (helpers) on other than steam power in any class of freight service (including all mixed, miscellaneous, and unclassified services) or in any class of yard service (including all transfer, belt line, and miscellaneous yard services), other than in crews designated by the local chairman, pursuant to the provisions of paragraphs B(2) and B(3) of this Award, except as may be necessary to provide jobs for firemen (helpers) whose employment rights are retained as provided in Parts C and D of this award; provided that no yard locomotive shall be operated without a fireman (helper) unless and until it is equipped with a deadman control in good operating condition.

PART C—REDUCTIONS IN EMPLOYMENT

C(1). After the expiration of 37 days following the effective date of this Award, the carrier shall not be required to hire firemen (helpers) on other than steam power in any class of freight service (including all mixed, miscellaneous, and unclassified services) or in any class of yard service (including all transfer, belt line, and miscellaneous yard services) unless or until such new hire is needed to man engine crews designated by a local chairman as provided in paragraphs B(2) and B(3) of this Award; and firemen (helpers) that are unneeded to man such designated crews may be separated from the carrier's payrolls and have all of their seniority and employment rights and relations terminated to the extent permitted in the following paragraphs of Part C of this Award.

C(2). Firemen (helpers) hired on or after a date 2 years prior to the effective date of this Award may be separated from the carrier's payrolls and have all of their employment and seniority rights and relations terminated, and in such case shall be entitled to a lump sum separation allowance in an amount to be determined as provided in Section 9 of the Washington Job Protection Agreement of May 21, 1936.

C(3). Firemen (helpers) hired prior to a date 2 years prior to the effective date of this Award whose average monthly earnings as firemen (helpers), hostler helpers, hostlers, or engineers have not exceeded $200 during the 24 full calendar months preceding the effective date of this Award, may be separated from the carrier's payrolls and have all of their employment and seniority rights and relations terminated with a severance allowance equal to 100 per cent of their earnings during the preceding 24 calendar months; or may elect to remain on the seniority lists of the carrier with rights to such work as they are qualified to perform, and which may be or become available to them, as provided in Part D of this Award.

C(4). Firemen (helpers) hired prior to a date 2 years prior to the effective date of this Award, who have not performed service as an engineer or as a fireman (helper) since that date, may be separated from the carrier's pay-

rolls as firemen (helpers) and have all of their employment and seniority rights and relations as firemen (helpers) terminated with no severance allowance.

C(5). The provisions of paragraphs C(3) and C(4) of this Award shall not apply to officers or employees of the organizations representing firemen or engineers employed by the carrier, or to supervisory or management officials of the carrier, or to employees on appropriate leaves of absence, or to discharged employees whose cases for reinstatement are pending, providing, if not so situated, they could have met the minimum requirements of service or earnings.

C(6). All other firemen (helpers) with less than 10 years' seniority on the effective date of this Award shall retain their rights to and obligations to protect engine service assignments as provided by rules in effect on the day preceding the day this Award becomes effective, except as modified by and subject to the provisions of Part D of this Award, unless and until offered by the carrier another comparable job (such as, but not limited to, engineer, fireman (helper), brakeman, or clerk in the same or another seniority district) for which they are, or can become, qualified. The offer of another job shall carry with it relocation expenses as provided for and under the conditions set forth in Section 10 of the Washington Job Protection Agreement of May 21, 1936, the continuation of accumulated seniority rights toward such purposes as vacation and other applicable fringe benefits, and guaranteed annual earnings, for a period not exceeding 5 years, equal to the total compensation received by each such employee as fireman (helper), hostler helper, hostler, or engineer during the last 12 months in which compensation was received prior to the date of transfer. Such offers of jobs shall be posted and made available to all qualified firemen (helpers) in order of seniority in the seniority district in which the job offered is located. If, within 7 days after notice is posted, no senior man elects to take such offered job, the most junior man then on the fireman (helper) roster in that seniority district must, within 3 days from receipt of written notice, accept the job or all of his employment and seniority rights and relations shall be terminated and, in

that event, he shall be entitled to one-half the severance allowance provided for in paragraph C(3) of this Award. If such junior fireman (helper) shall fail to accept such job and thereby terminates his employment as herein provided, the next most junior fireman (helper) on that same roster must accept the job within 3 days from receipt of written notice or forfeit all of his employment and seniority rights and relations with the allowance provided for above. In each case of refusal to accept such job offer the next most junior fireman (helper) shall be required to accept, as provided for above, or forfeit his employment and seniority rights and relations with, in each case, the allowance provided for above, until there are no firemen (helpers) with less than 10 years' seniority remaining on the seniority roster for the seniority district in which the job offer is located. Thereafter, the same procedure as is provided above shall be followed in the fireman (helper) seniority district which has its principal extra list for firemen (helpers) closest to the location of the job offered.

C(7). Firemen (helpers) with 10 or more years of seniority as of the effective date of this Award, who are not separated from the carrier's payrolls under the provisions of paragraphs C(3) or C(4) of this Award, shall retain their rights to and obligations to protect engine service assignments as provided by rules in effect on the day preceding the day this Award becomes effective, except as modified by and subject to the provisions of Part D of this Award, unless and until retired, discharged for cause, or otherwise removed from the carrier's active working lists of firemen (helpers) by natural attrition.

Part D—Rights to Work

D(1). Firemen (helpers) who elect to remain on the seniority lists of the carrier as provided in paragraph C(3) of this Award shall be entitled to exercise their seniority rights as firemen (helpers) to available employment in engine crews used in passenger service and in freight and yard engine crews designated by the local chairmen in their respective seniority districts as provided in paragraphs B(2) and B(3) of this Award, as hostlers or hostler

helpers, and as engineers in any class of service for which they are qualified; but such firemen (helpers) shall have no rights to and shall not claim seniority rights to or employment in any other service.

D(2). Firemen (helpers) who remain on the active working lists of the carrier under the provisions of paragraphs C(6) and C(7) of this Award shall have the right to work their turn as firemen (helpers) to the extent that positions as firemen (helpers) are available in their respective seniority districts on locomotives of the type to which firemen (helpers) were assigned and in a class of service calling for the service of a fireman (helper) prior to the effective date of this Award; provided, that such firemen (helpers) shall have no right to jobs that the carrier may discontinue pursuant to the provisions of this Award if other employment in any class of engine service, for which they are qualified, is available to them in their respective seniority districts. Such firemen (helpers) will have their seniority rights, existing as of the effective date of this Award, for promotion in their turn, preserved.

D(3). Extra lists shall be adjusted and firemen (helpers) shall be furloughed and recalled pursuant to the provisions of rules in effect as of the day before the day this Award becomes effective, as modified by and subject to the provisions of this Award; provided, that the carrier shall not be required to use firemen (helpers) covered by paragraph D(2) of this Award in freight or yard crews, other than in crews designated by the local chairmen pursuant to the provisions of paragraphs B(2) and B(3), if the services of such employees are required on the extra list to fill vacancies in crews or positions where firemen (helpers) must be used, as in passenger service or under the provisions of this Award.

D(4). Firemen (helpers) retained in service under the conditions set forth in Parts C and D of this Award, when assigned to the extra lists for firemen (helpers), shall not be called to fill vacancies in crews in freight and yard service which have not been designated by the local chairmen pursuant to the provisions of paragraphs B(2) and B(3) of this Award if and when their services are required to fill temporary vacancies as locomotive engineers, or

temporary vacancies for firemen (helpers) in passenger service, or temporary vacancies for firemen (helpers) in crews designated by the local chairmen as provided in paragraphs B(2) and B(3) of this Award.

PART E—CONTINUING STUDY

E(1). Within 30 days following the effective date of this Award, the parties shall establish a National Joint Board charged with responsibility for making an intensive and continuing study of the experience in road freight and yard service with and without the employment of firemen (helpers) during the period that this Award remains in effect. During the 3-month period before the date this Award is due to expire, the National Joint Board shall prepare and issue to the parties a report based on its study.

E(2). The National Joint Board established in paragraph E(1) shall consist of 4 members, of whom 2 shall be selected by the carriers, and one each by the Brotherhood of Locomotive Firemen and Enginemen, and by the Brotherhood of Locomotive Engineers. The expenses of the Board shall be borne by the participating parties.

III. CONSIST OF ROAD AND YARD CREWS (OTHER THAN ENGINE SERVICE)

PART A—BASIC PROVISIONS

A(1). The issue of crew consist (other than engine service) shall be remanded to the local properties for negotiation. Pending the consummation of local agreements disposing of the issue, the following provisions shall govern the use of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, and flagmen) employed in all classes of road service, including all miscellaneous and unclassified services, and the use of brakemen or helpers employed in all classes of yard, transfer, and belt line service, including all miscellaneous yard services.

A(2). No change shall be made in the scope or application of rules in effect immediately prior to the effective date of this Award, whether established by agreement, interpretation, or practice, which require a stipulated num-

ber of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, or flagmen) in any class of road service, including all miscellaneous and unclassified services, or which require a stipulated number of brakemen or helpers in any class of yard, transfer, or belt line service, including all miscellaneous yard services, except by agreement, or pursuant to the provisions of this Award.

A(3). Either party in interest shall give written notice of any proposed change in any such stipulated number of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, or flagmen) used in any class of road service, including all miscellaneous and unclassified services, in the following categories:

(a) branch lines, including the use of main lines where necessary to reach initial or final terminals of the branch line train; and

(b) road service where existing rule, practice, or interpretation now requires the employment of more or less than 2 trainmen;

and of any proposed change in any such stipulated number of brakemen or helpers used in any class of yard, transfer, or belt line service, including all miscellaneous yard service. The parties in interest, as that term is used in this Award, shall include only the carrier and the organization representing the class or craft of employees holding seniority rights to the position or positions proposed to be abolished or created in the seniority district or districts in which such changes are proposed. The time and place for the beginning of conferences between the representatives of the parties in interest with respect to such proposed change or changes shall be agreed upon within 10 days after the receipt of said notice, and said time shall be within 15 days after the receipt of said notice.

PART B—REVIEW PROCDURES

B(1). If no agreement is reached between the parties as to the application of the guidelines enumerated in Part C of this Award, the dispute limited to the application

of such guidelines as related to the issue involved may be referred by either party to a special board of adjustment.

B(2). Such special board of adjustment shall be chosen in the following manner:

(a) Each party in interest shall name one member within 10 days after notice has been given that the dispute will be referred to such special board of adjustment; and the two partisan members so chosen, within 10 days after the date of the selection of the second partisan member, shall name the neutral member, who shall be chairman of the board. If the members chosen by the parties shall fail to name the neutral member of the board within 10 days, the National Mediation Board shall be requested to name such member within 5 days after the receipt of such request.

(b) If either party fails to name a member of the board within the 10 days provided in paragraph B(2)(a) of this Award, the National Mediation Board shall be requested to name such member in lieu of such party and shall also name the neutral member necessary to constitute a board of 3 members, all within 5 days after the receipt of such request.

B(3). Decisions of the special board of adjustment shall be rendered within 60 days after the appointment of the neutral member. A decision of the majority of the board shall be binding upon both parties. The parties shall assume the costs and expenses of their respective representatives. The costs and expenses of the neutral member and any incidental expenses shall be shared equally by the parties unless different arrangements can be made by mutual agreement.

PART C—GUIDELINES

C(1). The special board of adjustment in making its decisions shall be governed by the following general considerations, and, where applicable, particular considera-

tions, although none of these factors alone shall be controlling of the board's decisions.

C(2). General considerations.

(a) Assurance of adequate safety.
(b) Avoidance of unreasonable burden or workload on members of the crew.
(c) Changes in operating conditions, including density of traffic.
(d) Practices regarding the consist of crews in comparable situations where such practices are not in dispute.
(e) Special conditions which exist on any particular assignment.
(f) Duties required in compliance with the carrier's operating rules and instructions applicable to the crew in question.
(g) Physical characteristics of the line to be traversed and in the areas where switching or industrial work is to be performed (including grade and general climatic conditions).
(h) The number of highway, street, road, railroad, or other crossings or intersections to be protected.
(i) State, county, or municipal regulations applicable with respect to highway, street, road, railroad, or other crossings or intersections.
(j) Availability and use of communication equipment (such as, but not limited to, end-to-end train radio, train to way-side radio, and walkie-talkies).
(k) The presence or absence of a fireman in the engine service crew.

C(3). Particular considerations—passenger road service.

(a) The amount of baggage and storage mail to be handled on and off the train at intermediate stations by the train crew.
(b) The number of passenger cars handled in the train and passenger count.
(c) The method of handling passenger transportation (tickets).

(d) The number of passengers boarding and leaving the train at intermediate stations.
(e) Duties required other than the above on any particular assignment.

C(4). Particular considerations—freight service, including miscellaneous and unclassified services.

(a) The amount and nature of work to be performed en route.
(b) The length of train, in context with the amount and nature of work to be performed en route.
(c) Time limitations applicable to the particular assignment.

C(5). Particular considerations—yard, transfer, and belt line service, including all miscellaneous yard services.

(a) The amount and nature of the work to be performed.
(b) Volume of work considered in context with applicable service time limitations.

PART D—EMPLOYEE PROTECTION

D(1). Road trainmen and yard brakemen or helpers, other than those on furlough on the date that this Award becomes effective, shall be known and designated, for the purposes of this Award, as "protected employees."

D(2). A "protected employee," known and designated as provided in paragraph D(1) of this Award, shall retain his rights to and obligations to protect road and yard service assignments (including all assignments in miscellaneous and unclassified road services and all assignments in transfer, belt line, and miscellaneous yard services) for which he is qualified, as provided by rules in effect on the day preceding the day this Award becomes effective, to the extent that such positions are available to him in his seniority district, unless and until retired, discharged for cause, or otherwise removed from the carrier's active working lists of road trainmen and yard brakemen or helpers by natural attrition; provided, that no such "protected employee" shall have any

right to jobs or positions that the carrier may discontinue pursuant to the provisions of this Award if other employment in any such classes of service, for which such employee is qualified, is available to him in his seniority district. If and when the carrier is required to create new jobs or positions for road trainmen or yard brakemen or helpers, pursuant to the provisions of this Award, such positions shall first be filled, to the extent available, by "protected employees" then filling positions which the carriers would otherwise have the right to abolish or eliminate pursuant to the provisions of this Award, before such jobs or positions may be claimed by other employees of the carrier in accordance with their seniority rights.

IV. Duration

This Award shall continue in force for two years from the date it takes effect, unless the parties agree otherwise.

Dated: November 25, 1963

/s/ Benjamin Aaron,
Neutral Member.

/s/ James J. Healy,
Neutral Member.

/s/ Ralph T. Seward,
Chairman of the Arbitration Board.

Concurring:

/s/ Guy W. Knight,
Carrier Member.

/s/ J. E. Wolfe,
Carrier Member.

Dissenting:

H. E. Gilbert,
Organization Member.

R. H. McDonald,
Organization Member.

APPENDIX G

Rulings By Arbitration Board No. 282

Carriers' Question #2

Section II—Part B(3) Answered May 17, 1964

Q. No. 2—It is the carriers' understanding that new regular assignments may be operated without a fireman unless or until included in the local chairmen's subsequent veto pursuant to Part B(3) of Section II. Is the carriers' understanding correct?

Answer—This understanding is correct.

B.L.F. & E. Question #6 Answered May 17, 1964

Q. No. 6—(a) May the carrier abolish an assignment which has been vetoed by a local chairman in a subsequent ninety (90) day interim period between listings and therefore lower the percentage of vetoed positions below ten (10) per cent?

(b) May the carrier consider as blankable, those assignments which may be established in a ninety (90) day interim period between listings, and therefore lower the percentage of vetoed positions below ten (10) per cent?

Answer—(a) In an interim period between listings, the carrier may abolish an assignment which has been vetoed by a local chairman. If this is done however, the local chairman may immediately veto an alternate assignment for each vetoed assignment so abolished.

(b) New regular assignments, established during an interim period between listings, may be operated without a fireman unless or until included in the local chairman's subsequent veto.

B.L.F. & E. Question #9 Answered May 17, 1964

Q. No. 9—May the carrier consider as a blankable job and refuse employment of a helper-fireman on extra assignments in road freight and yard service, including service

on light engine movements, messenger service and on self-propelled machines where presently required?

Answer—The carrier may not refuse employment of a fireman (helper) in extra road freight and extra yard service including extra light engine movements, messenger service and self-propelled machines (if any self-propelled machines are operated on which firemen (helper) are presently required) if there are employees who are available for service where rights to continued employment as firemen (helpers) are protected under Section II, Parts C and D of this Award. If no such employees are available, however, a new employee need not be hired.

B.L.F. & E. Question #79 Answered September 16, 1964

B.L.F. & E. Question #79—May the carrier hold a C-6 or C-7 helper-fireman on the extra board to fill a vacancy on a non-blankable assignment and, in turn, operate an extra assignment without a helper-fireman?

Answer—The carrier may hold a C-6 or C-7 fireman (helper) on the extra board to fill a vacancy on a non-blankable assignment, and, in turn, operate an extra assignment without a fireman (helper), unless such action would cause the fireman (helper) to lose a day or more of work.

B.L.F.&E. Question # 82 Answered October 23, 1964

B.L.F. & E. Question #82—Is it the intent of the Award and its subsequent interpretations to allow a carrier to arbitrarily ignore the criteria of safety, efficiency and burden of work in creating "blanked" assignments and instead apply the criteria of earnings and cost of employing a helper-fireman as the principle factor of determination?

Answer—Section II, Part B, Paragraph B(1), contemplates that in determining which crews do not require the services of a fireman, the carrier's judgment of the factors of safety, undue work burden and adequate and safe transportation service to the public shall be controlling.

B.L.F. & E. Question #105 Answered September 16, 1964

B.L.F. & E. Question 105—May a carrier omit from their original list as served to local chairmen under Paragraph B-1, a road freight assignment operated regularly by time-table schedule and employing helpers-firemen called from the extra board, and then consider such job as blankable? (Central Vermont).

Answer—So long as the road freight operation involved in this dispute is considered to be extra service it is subject to the answer to B.L.F. & E. Question No. 9 of the Board's interpretations issued May 17, 1964.

B.L.F. & E. Question #135 Answered September 16, 1965

B.L.F. & E. Question No. 135—MAY THE ATCHINSON, TOPEKA & SANTA FE RAILWAY CORRECT AND/OR ADD TO LISTS OF NEWLY ESTABLISHED ASSIGNMENTS AS ISSUED AT THE END OF A 90-DAY PERIOD UNDER PARAGRAPH B(3), IN ORDER TO INCLUDE JOBS WHICH WERE ERRONEOUSLY OMITTED AND WOULD SUBSEQUENTLY REQUIRE THE EMPLOYMENT OF HELPERS-FIREMEN, BECAUSE OF THE CARRIER'S ERROR?

Answer—Consistent with the period of grace allowed to both parties in the original listing and vetoing of jobs, it is the intent of the Board to permit a reasonable opportunity for the correction of errors of omission in the preparation of revised lists under Section II, Part B(3) of the Award. If a carrier gives notice within seven (7) days of a listing date that it had erroneously omitted from the list of newly established assignment, such notice shall become effective only at the beginning of the next succeeding 90-day period. In the interim 90-day period, the assignment shall be regarded as a "must fill" job.

SUNA QUESTION No. III Answered June 9, 1964

III

Q. No. III—In the event the Carriers serve notice under caption III Consist of Road and Yard Crews (other than engine service) PART A—BASIC PROVISIONS A-3, or if procedures under PART B are not completed or decisions of special boards of adjustment have not been rendered under B-3 on the date Arbitration Board No. 282 terminates:

QUESTION 1.—DO ALL PROCEDURES TERMINATE ON THE DATE THE BOARD TERMINATES?

QUESTION 2.—ARE ALL DECISIONS WHICH MAY BE RENDERED BY A NEUTRAL SUBSEQUENT TO THE DATE THE BOARD TERMINATES VOID?

Answer—These questions do not call for an interpretation of the Board's Award. They call for an opinion as to the legal situation which exist following the termination of the Board's Award. The Board therefore lacks jurisdiction to answer them.

CARRIERS' QUESTION #5

Section II—Part B(1) and B(2) Answered May 17, 1964

Q. No. 5—The organization representatives have taken the position that the submission of lists pursuant to Section II, Part B(1), of the Award in so-called "full crew law states" is improper or illegal, and in certain of such instances they have refused to make designations under Part B(2) of assignments on which firemen shall be retained and in other instances they have designated all of the assignments listed by the carrier. It is the carriers' position that the carriers were required to submit lists under Part B(1) in order that there will be a classification of "blankable" and "non-blankable" jobs when and if such full crew laws are amended or repealed; that where the local chairmen have failed to make designations

pursuant to Part B(2), all of the jobs listed are "blankable", and where they have designated all of the jobs listed as requiring the retention of firemen, no more than 10 per cent of such jobs so designated will be accepted as requiring the retention of firemen, the others to be in the "blankable" category. Is the carriers' position correct?

Answer—The obligations and rights of the parties with respect to the listing of jobs and the exercise of the veto under Section II, Parts B(1), B(2), B(3) and B(4) of the Award are the same in the so-called "full crew law states" as in all other states. Local chairmen who have failed to make designations pursuant to Part B(2) in "full crew law states" may make such designations on or before June 3, 1964. Where the present designation by the local chairman designates all of the jobs listed as requiring the retention of firemen, he should modify such designations to conform to the 10 per cent limitation as interpreted by the Board in its answer to carrier's question No. 4 under Section II, Parts B(1) and B(2) on or before June 3, 1964.

APPENDIX H

Statutes Involved

Public Law 88-108, 77 Stat. 132:

Whereas the labor dispute between the carriers represented by the Eastern, Western, and Southeastern Carriers' Conference Committees and certain of their employees represented by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America, labor organizations, threatens essential transportation services of the Nation; and

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained; and

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not resulted in settlement of the dispute; and

Whereas the Congress finds that emergency measures are essential to security and continuity of transportation services by such carriers; and

Whereas it is desirable to achieve the above objectives in a manner which preserves and prefers solutions reached through collective bargaining; and

Whereas, on August 2, 1963, the Secretary of Labor submitted to the carrier and organization representatives certain suggestions as a basis of negotiation for disposition of the fireman (helper) and crew consist issues in the dispute and thereupon through such negotiations tentative agreement was reached with respect to portions of such suggestions; and

Whereas, on August 16, 1963, the carrier parties to the dispute accepted and the organization parties to the dispute accepted with certain reservations the Secretary of Labor's suggestion that the fireman (helper) and crew consist issues be resolved by binding arbitration but the said parties have been unable to agree upon the terms

and procedures of an arbitration agreement: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That no carrier which served the notices of November 2, 1959, and no labor organization which received such notices or served the labor organization notices of September 7, 1960, shall make any change except by agreement, or pursuant to an arbitration award as hereinafter provided, in rates of pay, rules, or working conditions encompassed by any of such notices, or engage in any strike or lockout over any dispute arising from any of such notices. Any action heretofore taken which would be prohibited by the foregoing sentence shall be forthwith rescinded and the status existing immediately prior to such action restored.

SEC. 2. There is hereby established an arbitration board to consist of seven members. The representatives of the carrier and organization parties to the aforesaid dispute are hereby directed, respectively, within five days after the enactment hereof each to name two persons to serve as members of such arbitration board. The four members thus chosen shall select three additional members. The seven members shall then elect a chairman. If the members chosen by the parties shall fail to name one or more of the additional three members within ten days, such additional members shall be named by the President. If either party fails to name a member or members to the arbitration board within the five days provided, the President shall name such member or members in lieu of such party and shall also name the additional three members necessary to constitute a board of seven members, all within ten days after the date of enactment of this joint resolution. Notwithstanding any other provision of law, the National Mediation Board is authorized and directed: (1) to compensate the arbitrators not named by the parties at a rate not in excess of $100 for each day together with necessary travel and subsistence expenses, and (2) to provide such services and facilities as may be necessary and appropriate in carrying out the purposes of this joint resolution.

SEC. 3. Promptly upon the completion of the naming of

the arbitration board the Secretary of Labor shall furnish to the board and to the parties to the dispute copies of his statement to the parties of August 2, 1963, and the papers therewith submitted to the parites, together with memorandums and such other data as the board may request setting forth the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement. The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve the matters on which the parties were not in agreement, and shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration.

SEC. 4. To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act. The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed, and the arbitration board shall report to the National Mediation Board in the same manner as arbitration boards functioning pursuant to the Railway Labor Act. The award shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise.

SEC. 5. The arbitration board shall begin its hearings thirty days after the enactment of this joint resolution or on such earlier date as the parties to the dispute and the board may agree upon and shall make and file its award not later than ninety days after the enactment of this joint resolution: *Provided, however,* That said award shall not become effective until sixty days after the filing of the award.

SEC. 6. The parties to the disputes arising from the aforesaid notices shall immediately resume collective bargaining with respect to all issues raised in the notices of November 2, 1959, and September 7, 1960, not to be disposed of by arbitration under section 3 of this joint resolution and shall exert every reasonable effort to resolve such issues by agreement. The Secretary of Labor and the National Mediation Board are hereby directed to give all reasonable assistance to the parties and to engage in mediatory action directed toward promoting such agreement.

SEC. 7. (a) In making any award under this joint resolution the arbitration board established under section 2 shall give due consideration to the effect of the proposed award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation.

(b) The obligations imposed by this joint resolution, upon suit by the Attorney General, shall be enforcible through such orders as may be necessary by any court of the United States having jurisdiction of any of the parties.

SEC. 8. This joint resolution shall expire one hundred and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence.

SEC. 9. If any provision of this joint resolution or the application thereof is held invalid, the remainder of this joint resolution and the application of such provision to other parties or in other circumstances not held invalid shall not be affected thereby.

Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. 151, et seq.

* * * * *

FUNCTIONS OF MEDIATION BOARD

SEC. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use it best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in Section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of this Act, no emergency board shall be created under Section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

* * * * *

SEC. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after after termination of conferences without request for or proffer of the services of the Mediation Board.

ARBITRATION

SEC. 7. First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.

Second. Such board of arbitration shall be chosen in the following manner:

(a) In the case of a board of three, the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name one arbitrator; the two arbitrators thus chosen shall select

a third arbitrator. If the arbitrators chosen by the parties shall fail to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the Mediation Board.

(b) In the case of a board of six, the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators; the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators. If the arbitrators chosen by the parties shall fail to name the two arbitrators within fifteen days after their first meeting, the said two arbitrators, or as many of them as have not been named, shall be named by the Mediation Board.

Third. (a) When the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators, they shall notify the Mediation Board, and, in the event of their failure to agree upon any or upon all of the necesasry arbitrators within the period fixed by this Act, they shall, at the expiration of such period, notify the Mediation Board of the arbitrators selected, if any, or of their failure to make or complete such selection.

(b) The board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings: *Provided, however,* That the board of arbitration shall be bound to give the parties to the controversy a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel, or by other representatives as they may respectively elect.

(c) Upon notice from the Mediation Board that the parties, or either party, to an arbitration desire the reconvening of the board of arbitration (or a subcommittee of such board of arbitration appointed for such purpose pursuant to the agreement to arbitrate) to pass upon any controversy over the meaning or application of their award, the board, or its subcommittee, shall at once reconvene. No question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommittee.

Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed in the same district court clerk's office, as the original award and become a part thereof.

(d) No arbitrator, except those chosen by the Mediation Board, shall be incompetent to act as an arbitrator because of his interest in the controversy to be arbitrated, or because of his connection with or partiality to either of the parties to the arbitration.

(e) Each member of any board of arbitration created under the provisions of this Act named by either party to the arbitration shall be compensated by the party naming him. Each arbitrator selected by the arbitrators or named by the Mediation Board shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, while serving as an arbitrator.

(f) The board of arbitration shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as hereinafter provided. The said board shall also furnish a certified copy of its award, and the papers and proceedings, including testimony relating thereto, to the Mediation Board, to be filed in its office; and in addition a certified copy of its award shall be filed in the office of the Interstate Commerce Commission: *Provided, however,* That such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Commerce Commission, under the Interstate Commerce Act, as amended.

(g) A board of arbitration may, subject to the approval of the Mediation Board, employ and fix the compensation of such assistants as it deems necessary in carrying on the arbitration proceedings. The compensation of such employees, together with their necessary traveling expenses

and expenses actually incurred for subsistence, while so employed, and the necessary expenses of boards of arbitration, shall be paid by the Mediation Board.

Whenever practicable, the board shall be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may conduct its proceedings or deliberations.

(h) All testimony before said board shall be given under oath or affirmation, and any member of the board shall have the power to administer oaths or affirmations. The board of arbitration, or any member thereof, shall have the power to require the attendance of witnesses and the production of such books, papers, contracts, agreements, and documents as may be deemed by the board of arbitration material to a just determination of the matters submitted to its arbitration, and may for that purpose request the clerk of the district court of the United States for the district wherein said arbitration is being conducted to issue the necessary subpoenas, and upon such request the said clerk or his duly authorized deputy shall be, and he hereby is, authorized, and it shall be his duty, to issue such subpoenas. In the event of the failure of any person to comply with such subpoena, or in the event of the contumacy of any witness appearing before the board of arbitration, the board may invoke the aid of the United States courts to compel witnesses to attend and testify and to produce such books, papers, contracts, agreements, and documents to the same extent and under the same conditions and penalties as provided for in the Act to regulate commerce approved February 4, 1887, and the amendments thereto.

Any witness appearing before a board of arbitration shall receive the same fees and mileage as witnesses in courts of the United States, to be paid by the party securing the subpoena.

SEC. 8. The agreement to arbitrate—

(a) Shall be in writing;

(b) Shall stipulate that the arbitration is had under the provisions of this Act;

(c) Shall state whether the board of arbitration is to consist of three or of six members;

(d) Shall be signed by the duly accredited representatives of the carrier or carriers and the employees, parties respectively to the agreement to arbitrate, and shall be acknowledged by said parties before a notary public, the clerk of a district court or circuit court of appeals of the United States, or before a member of the Mediation Board, and, when so acknowledged, shall be filed in the office of the Mediation Board;

(e) Shall state specifically the questions to be submitted to the said board for decision; and that, in its award or awards, the said board shall confine itself strictly to decisions as to the questions so specifically submitted to it;

(f) Shall provide that the questions, or any one or more of them, submitted by the parties to the board of arbitration may be withdrawn from arbitration on notice to that effect signed by the duly accredited representatives of all parties and served on the board of arbitration;

(g) Shall stipulate that the signatures of a majority of said board of arbitration affixed to their award shall be competent to constitute a valid and binding award;

(h) Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board (as provided for in the agreement) within which the said board shall commence its hearings;

(i) Shall fix a period from the beginning of the hearings within which the said board shall make and file its award: *Provided,* That the parties may agree at any time upon an extension of this period;

(j) Shall provide for the date from which the award shall become effective and shall fix the period during which the award shall continue in force;

(k) Shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arose or the arbitration was entered into, which district shall be designated in the

agreement; and, when so filed, such award and proceedings shall constitute the full and complete record of the arbitration;

(l) Shall provide that the award, when so filed, shall be final and conclusive upon the parties as to the facts determined by said award and as to the merits of the controversy decided;

(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award; and

(n) Shall provide that the respective parties to the award will each faithfully execute the same.

The said agreement to arbitrate, when properly signed and acknowledged as herein provided, shall not be revoked by a party to such agreement: *Provided, however,* That such agreement to arbitrate may at any time be revoked and canceled by the written agreement of both parties, signed by their duly accredited representatives, and (if no board of arbitration has yet been constituted under the agreement) delivered to the Mediation Board or any member thereof; or, if the board of arbitration has been constituted as provided by this Act, delivered to such board of arbitration.

* * * * *

SEC. 9. First. The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Second. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter

set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the results of the arbitration: *Provided, however,* That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this Act: *Provided further,* That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

Fourth. If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall determine that a part of the award is valid, the court shall set aside the entire award: *Provided, however,* That, if the parties shall agree thereto, and if such valid and invalid parts are separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

Fifth. At the expiration of ten days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said ten days either party shall appeal therefrom to the circuit court of appeals. In such case only such

portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided.

Sixth. The determination of said circuit court of appeals upon said questions shall be final, and being certified by the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

Seventh. If the petitioner's contentions are finally sustained, judgment shall be entered setting aside the award in whole or, if the parties so agree, in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

Eighth. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor or service by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

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SUPREME COURT, U. S.

FILED

JAN 16 1968

JOHN F. DAVIS, CLERK

No. 933

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

BANGOR AND AROOSTOOK RAILROAD COMPANY, et al., and THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., *Petitioners,*

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Respondent.*

MEMORANDUM OF RESPONDENT BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

JOSEPH L. RAUH, JR.
JOHN SILARD
HARRIETT R. TAYLOR
Rauh and Silard
1001 Connecticut Ave., N.W.
Washington, D.C. 20036

ISAAC N. GRONER
DAVID EPSTEIN
STEPHEN E. MOSS
Cole and Groner
1730 K Street, N.W.
Washington, D.C. 20006

HAROLD C. HEISS
DONALD W. BENNETT
Heiss, Day and Bennett
Keith Building
Cleveland, Ohio 44115
Attorneys for Respondent.

Of Counsel:

ALEX ELSON
WILLARD J. LASSERS
AARON S. WOLFF
Elson, Lassers and Wolff
11 South La Salle Street
Chicago, Illinois 60603

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BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Respondent.*

MEMORANDUM OF RESPONDENT BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

The railroads' petition for certiorari in this case is the inverse of the union's earlier petition in No. 859, *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor & Aroostook Railroad Company, et al.* Here the railroads are urging this Court to review the decision below and to hold that the Award of Arbitration Board No. 282 continues in full force and effect after its expiration date unless and until changed through a new effort at collective bargaining between the parties. In No. 859 the union is urging this Court to review the decision below and to hold that the Award of Arbitration Board 282 expired in accordance with its terms so that reductions in firemen jobs affected thereunder do not survive its expiration and additional reductions thereafter are barred. Just as the railroads do not oppose the grant of the petition in No. 859, so the union does not oppose review in the instant case.

In simplest terms, Nos. 859 and 933 are two sides of the same coin. In the first case the union asks this Court to give full force and effect to the statutory expiration clause by restoring the pre-Award fireman manning requirements of the National Diesel Agreement upon the Award's expiration. In No. 933 the railroads ask for the exact opposite, namely the extinction of the expiration clause by continuation of the Award unless and until changed through appropriate bargaining procedure under the Railway Labor Act. In this direct conflict of position, the considerations for and against review by this Court are essentially the same in the two cases and we strongly urge the Court to grant review in both.[1]

While we thus recognize the propriety of review of the basic issue of fireman manning requirements upon the expiration of the Award, we respectfully suggest that there is no warrant for review of question 2 of the Questions Presented by the railroads' petition (p. 3). There the railroads raise the separate and distinct issue whether the BLF&E collective bargaining notices were properly served during the period prior to the expiration of the Award in regard to proposed changes in rules and agreements to become effective *after* the expiration of the Award. The decision of the court below on this issue is clearly correct (see Petition in No. 859, pp. 16a-21a). The railroads had promised Congress that they would bargain within the period of the Award (Petition in No. 859, pp. 13-14) and the union sought no more than to hold them to this promise. This factor alone would render irrelevant the cases cited by the railroads in their petition in No. 933 (pp. 37-38). But reliance on these cases is also misplaced because the bar-

[1] Because neither side questions the need for review, we shall not burden the Court at this point with answers to the contentions on the merits put forth by the railroads in their petition in No. 933 and in their response in No. 859.

gaining requested in those cases sought changes in working conditions *prior* to the expiration date of the agreements rather than, as here, *after* the expiration date of the Award. Accordingly there can be no serious question as to the correctness of the decision below on this point.

Moreover, the grant of review on the ancillary bargaining issue would further postpone bargaining which has now been stymied for over two years. The union initially sought bargaining on the fireman manning issue in November, 1965; the more than two-year delay in bargaining has already immeasurably injured both the union and its members and this delay ought not needlessly be further continued by grant of review on the "prematurity" issue ancillary to the major dispute herein.[2]

* * * * *

The issue presented to the Court in these two cases is of vital importance to the nation's railroads and to the BLF&E and the many thousands of railroad workers it represents. Both sides argue vigorously that the court below has recast the statute in plain disregard of Congressional intention—we contend that Public Law 88-108 has been rewritten by the extinction of its expiration clause and the railroads urge that the Railway Labor Act has been denied all effect. This underlines the basic point made in our petition for certiorari in No. 859 (p. 30): "Comity toward and respect for the prerogatives of a coordinate branch call for the highest Court to render the judgment if a narrow and delicate Con-

[2] The railroads also seek to raise, in question 1(b) of the Questions Presented (Petition in No. 933, p. 3), whether Arbitration Board No. 282 has primary jurisdiction to determine issues as to the meaning and application of its Award. We reserve the right to present to the Court, if it grants review, the facts concerning the belated hour at which this issue was first raised and to suggest to the Court that it may lack or should not exercise jurisdiction to consider and decide this question.

gressional balance on a vital public issue requires judicial revision."

In view of the importance of this case to the nation's railroads and their workers, and the sensitivity of the Congressional-Judicial relationships here involved, we respectfully submit that the petition for a writ of certiorari in No. 859 should be granted and that question 1 in the petition in No. 933 should likewise be granted.

Respectfully submitted,

JOSEPH L. RAUH, JR.
JOHN SILARD
HARRIETT R. TAYLOR
Rauh and Silard
1001 Connecticut Ave., N.W.
Washington, D.C. 20036

ISAAC N. GRONER
DAVID EPSTEIN
STEPHEN E. MOSS
Cole and Groner
1730 K Street, N.W.
Washington, D.C. 20006

HAROLD C. HEISS
DONALD W. BENNETT
Heiss, Day and Bennett
Keith Building
Cleveland, Ohio 44115
Attorneys for Respondent.

Of Counsel:

ALEX ELSON
WILLARD J. LASSERS
AARON S. WOLFF
Elson, Lassers and Wolff
11 South La Salle Street
Chicago, Illinois 60603

(3411-6)